Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

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DENISE SMITH,
Petitioner

v.

TALLAHASSEE DEMOCRAT AND BILL COTTERELL,
Respondents.

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On a Civil Suit for Media Libel, Conspiracy to Libel, and Harassment and Intentional Infliction of Emotional Distress brought in The Circuit Court for the Second Judicial Circuit, Leon County, Florida

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## PETITION FOR A WRIT OF CERTIORARI

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68 pp

## QUESTIONS PRESENTED

A. When the state courts, in a media libel action, adjudge low ranking public employees - who have no power or influence over governmental affairs, and who have no access to the media and who are expressly prohibited from contacting the media to contradict a lie - to be "public officials," is that in conflict with the 1st and 14th Amendments to the U.S. Constitution governing free speech and press and past rulings of the U.S. Supreme Court?

B. For purposes of a media libel action, is the media's qualified Fair Reporting Privilege to report on judicial proceedings under the 1st and 14th Amendments to the U.S. Constitution lost when the report on the judicial proceeding contains biased commentary and admitted errors, and when the Newspaper itself claims that the report contains "*criticism*," "*opinion and/or judgment*"?

C. In a media libel action, in which a jury trial had been requested, and when there are extrinsic facts that show that the report is of and concerning plaintiff, is it improper for the judge, prior to trial or witness testimony, to decide that the report is <u>not</u> "of and concerning" plaintiff?

D. Is a person, who has requested a jury trial in a media libel action, and who is deemed by the lower court to be a "public official," and who alleges a high degree of probable falsity of the facts and gist of the publication in the minds of the publishers prior to publishing, entitled to present the issue of actual malice to a jury?

E. When a jury trial is requested and all questions of fact have been controverted, is the right to a jury trial under the 7th and 14th Amendments to the U.S. Constitution violated when a judge decides all of the issues of fact that are controverted, and dismisses the case based on those decisions of fact?

**PARTIES TO PROCEEDING**

in the Action filed in
The Circuit Court for the Second Judicial Circuit,
Leon County, Florida, Case # 00-848

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Respondents/Defendants
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Wendy Searcy, Defendant
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Chattahoochee, FL 32324

Jerry G. Traynham and Patterson & Traynham,
Defendants
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## OPINIONS AND ORDERS BELOW

Regarding Respondents/Defendants Democrat and Cotterell:

1. Circuit Court for the Second Judicial Circuit, Leon County, Florida, Case #00-848, Order Dismissing Complaint Against Defendants Democrat and Cotterell With Prejudice - ordered and adjudged 9-11-00 (A1).
2. District Court of Appeal, First District, State of Florida, Case #1D00-3928, Per Curiam Affirmed on 7-3-01 (A2).
3. Florida First District Court of Appeal, Appellant's Motion for Rehearing, Clarification, and Certification denied on 9-26-01 (A3).
4. Supreme Court of Florida, Case #SC01-2223, Acknowledgement of New Case, dated 10-22-01, and review denied 10-22-01 (A4).

Regarding Respondents' co-defendant Searcy:

5. Circuit Court for the Second Judicial Circuit, Leon County, Florida, Case #00-848, Order dismissing Complaint against defendant Wendy Searcy with prejudice, 6-25-01 (A5) - (currently on appeal before the Florida First District Court of Appeal Case #1D01-2947.)

## BASIS FOR JURISDICTION

6. The Florida First District Court of Appeal Per Curiam Affirmed the lower court's order on 7-3-01 (A2) and denied rehearing on 9-26-01 (A3). The Supreme Court of Florida denied petitioner's request for review of the lower courts' rulings and barred rehearing on 10-22-01 (A4). On 1-4-02, Justice Kennedy extended the time to file this Petition to 2-16-02 (A6). Jurisdiction of this Court is invoked under 28 USC § 2104.

## CONSTITUTIONAL PROVISIONS INVOLVED

7. Questions pertaining to defamation in media libel cases and what defenses will be recognized must be determined in light of the 1st and 14th Amendments of the U.S. Constitution.
8. The petitioner's right to protection of her reputation is guaranteed under the 5th and 14th Amendments to the U.S. Constitution.
9. Due process and the right to sue are guaranteed under the 5th and 14th Amendments to the U.S. Constitution and 42 U.S.C. § 1981.
10. The right to a trial by jury is guaranteed under the 7th and 14th Amendments to the U.S. Constitution.

## Preliminary Statement

11. I respectfully ask this Court to consider that I am an accountant with no college degree and no legal training or experience whatsoever, and that I could not find an attorney to represent me because the primary defendant in my suit is a Florida attorney. I have made many unsuccessful attempts to retain counsel through the Florida Bar Association and other referrals. Understandably, attorneys are very reluctant to take lawsuits against colleagues. Consequently, I have been left with no alternative but to proceed on my own. This is the most difficult task I have ever undertaken. No American should have to work as hard as I have in order to access our constitutional right of redress of grievances.
12. Petitioner respectfully suggests to this Court that this case is a classic example of why there are libel laws, and why the distinction between public official and public employee must be clarified and maintained. Our society boasts that its citizen's have the opportunity and, more importantly, the right to work hard to pay for their home and their chosen lifestyle,

and the right to protect their property. Prior to these events I had an exemplary record in the 27 years I had been employed. It is a matter of public record that the actions of the respondents and their co-defendants have resulted in serious damage to my reputation and employment, and they have severely and irreversibly damaged my future wage earning opportunities. I respectfully suggest to this Honorable Court that the issues presented in my case are infinitely more important than the form in which they are submitted. United States Supreme Court Justice Potter Stewart was quoted as saying...

> *"Take the case of Gideon v. Wainwright. It originated with a half-literate scrawl written by a person in a Florida prison and ended up as a very important case in the Supreme Court of the United States. When Gideon wrote that petition to the Supreme Court, he knew, and correctly and rightly knew, and relied upon the fact, that it would reach the office of every single judge there and not just some faceless bureaucrat. I think, as our country is getting bigger and bigger and most organizations - public and private - have lost their human personalities, that it is very important that there be one institution in our country, national in scope, that is accessible and approachable and individual and human."*
>
> Appellate Practice Manual, Priscilla Schwab, Editor, © 1992 American Bar Assn.

13. In the spirit of Justice Stewart's words, I respectfully ask this Court to make allowances for petitioner's forced pro-se status, and to overlook technical deficiencies in form and content.

**STATEMENT OF THE CASE**

14. A plenary hearing was not had.

15. Appendices will be identified as "A#" followed by the paragraph number where applicable: (A#,¶#).

History of the Case

16. The *Tallahassee Democrat* ("Democrat" or "Newspaper") article ("Article") in question was about Lawrence Kranert ("Kranert"), a lawyer employed at Florida State Hospital, a state mental health facility operated by the Florida Department of Children & Families, where petitioner was also employed. Kranert had recently been demoted for a second time - this time from a Senior Attorney position into an Accountant position in the department petitioner managed. On 5-5-98, after working in petitioner's department for only six months, Kranert, authored a "*grievance*" or "*complaint*" which was solely about petitioner and which was about working conditions in petitioner's office. Kranert's co-defendant in the instant suit, Wendy Searcy ("Searcy"), faxed that grievance to the former governor of Florida. Hospital Administration advised Kranert that he was being transferred pending review of the issues he raised. Within 3 months, Kranert filed a lawsuit against the Florida Department of Children & Families and 7 state employees, including petitioner. None of the issues complained about in Kranert's "*grievance*" were counts in his lawsuit. On 8-31-98, respondent Newspaper published an Article (A7) which they claim is a report on Kranert's grievance and lawsuit. The Article, written by Bill Cotterell ("Cotterell"), contained wording which suggested that it was compiled with Kranert's input. The Article also contained a number of erroneous statements of fact not contained in the "*grievance*" or in the "*law suit*" the Newspaper claims to be reporting on. On 9-14-98, petitioner wrote (A8) to the Newspaper objecting to the Article. The Newspaper did not respond. On 9-14-99, petitioner served the statutory notice (A9) on the Newspaper, whereupon the Newspaper's Editor contacted the petitioner by telephone and was very abusive to her. On 10-19-99, petitioner faxed a letter (A10) to the Newspaper Editor complaining about the abusive contact. On 10-20-99,

the Newspaper Editor wrote to the petitioner (A11) outlining the Newspaper's understanding of what the Article was about, stating that they would not correct or retract and that they would not speak further with petitioner. On 4-13-00, petitioner filed a Civil Complaint 00-848, requesting a jury trial against respondents and other parties in the Second Judicial Circuit, Leon County, Florida. Respondents were charged with three counts: Count 2 - Media Libel, Count 3 - Conspiracy to Libel, and Count 5 - Harassment and Intentional Infliction of Emotion Distress. On 5-15-00, the Newspaper served a Motion to Dismiss. On 6-9-00, petitioner served her Answer. A transcribed hearing was held on 8-9-00. On 9-1-00, after the hearing but prior to the court's decision, respondent Cotterell sent an email (A12) to Hospital Administration stating that he intended to investigate petitioner and her department for "*mismanagement, morale problems or other irregularities.*" On 9-11-00 (A1), an order dismissing petitioner's Complaint against the Newspaper with prejudice was rendered. Almost immediately, on or about 9-13-00, Cotterell retracted his request to investigate petitioner (A13). On 9-18-00, as a proximate result of Cotterell's contact with my employer, petitioner was removed from her employment position. The lower court's order (A1) was Per Curiam Affirmed by the Florida 1st District Court of Appeal on 7-3-01 (A2). Petitioner's motion to the 1st District Court of Appeal for rehearing, clarification and certification was denied on 9-26-01 (A3). The Florida Supreme Court denied review on 10-22-01 (A4).

## ARGUMENT

Nature and Circumstances of the Libel

17. It would serve the purpose of this petition well to begin with the Newspaper's claim of what the Article was about. In response to a fax (A10) from me complaining about the Newspaper's abusive handling

of my request for retraction and correction, the Newspaper's Managing Editor wrote to me stating...

> "[M]*y understanding of the grievance was that it concerned a vendor doing business with the hospital who was providing purchasing officials with hockey tickets and other alleged perks, which Mr. Kranert objected to. I explained that the column's very broad description of that grievance - that it concerned 'what he considered improper practices in the finance office' - seemed to me to be accurate.*"
> (A11, ¶9)

18. The Editor's statement evidences that respondents intended for the Article to convey that Kranert's "*grievance*" or "*complaint*" concerned improper "financial" practices. This explains the gist and tenor of the Article.

Gist and Tenor of the Article

19. The gist and tenor of the Article was that Kranert, a "*degreed*" accountant and lawyer, had uncovered *improper practices in the finance office* petitioner managed, and that Kranert had filed a "*grievance*" about those "*improper practices in the finance office*" petitioner managed to the governor of Florida, who was inquiring into it, and that because Kranert had reported this "*financial*" wrongdoing to the governor, Kranert was mistreated and retaliated against by his "*manager*," who "*told*" him that he was being sent to work at an "*un-air-conditioned storehouse.*"

20. Neither Kranert's grievance - which many people knew was solely about petitioner - nor his lawsuit, on which petitioner was named as one of seven defendants, had anything to do with vendor pay offs, nor had that charge or any other charge of financial impropriety ever been made that was connected in any way with petitioner or the office she managed.

Not of "Public Interest," Not "Hot News"

21. The Article was not "hot news," affording respondents ample time to check their facts. The "judicial proceeding" was not a matter of "general or

public interest." Kranert's "*grievance*" concerned one person's employment problems concerning time sheet requirements, leave time, number of restrooms for male employees, etc. And, Kranert's lawsuit complains that he was terminated without a hearing. In fact, the lower court judge in the suit the Newspaper claims to be reporting on, dismissed one count stating that Kranert's personal employment problems were not "a matter of public interest."

Respondent should have had Serious Doubts as to Article's Truthfulness

22. The *Tallahassee Democrat*, the publisher of the Article and a member of the Knight-Ridder chain of 32 daily newspapers making it the 2nd largest newspaper publisher in the U.S., is a respected newspaper and the most widely read newspaper in the area. Bill Cotterell, the author of the Article, is a man with over 30 years experience in journalism.

23. The 8-31-98 Article was not "hot news" affording the publishers ample time to check their facts. On 2-27-00 Cotterell reported, "*Florida has some of the best open-records laws in the country, certainly the best of any of the five state capitals where I've worked,*" indicating that he had the opportunity to check his facts. Kranert's "*grievance*" and "*law suit*" were available for inspection only blocks from Cotterell's office, and the Newspaper has indicated that they had read these documents.

24. The facts put forth and the gist and tenor of the Article must have been highly suspect to the Newspaper and to the reporter. The Newspaper's Motion to Dismiss confirms that they quoted from Kranert's Complaint or "*lawsuit*," which had Kranert's "*grievance*" attached as exhibit "G," and they claim to be reporting on the "*judicial proceeding*" concerning that "*grievance*" and "*lawsuit*." However, the Article contains issues of fact that are in direct conflict with the issues of fact in that "*grievance*" and "*lawsuit*," and neither the grievance nor the lawsuit alleged "*financial*"

impropriety. Consequently, the Newspaper must have known that both the facts and the gist and tenor of the Article they planned to publish were false or, in the very least, the Newspaper must have had a high degree of awareness of probable falsity before composing and publishing the Article. That, together with the fact that, as the Article itself states, Kranert had a notable history of employment problems - including 2 demotions and the filings of both a "*grievance*" to the governor and a "*lawsuit*" against his employer and 7 other defendants including petitioner - should have caused respondents to consider the high probability that Kranert had an ax to grind, and to consider checking further before publishing that Article. Moreover, the suggested irresponsible and blatantly retaliatory treatment of so highly competent an individual - one who is a degreed accountant and also a state lawyer - for reporting financial wrongdoing to the governor of the state and being blatantly retaliated against for doing so, should have caused respondent to question the reasonableness of that allegation and to use caution in writing and publishing the Article without checking further. Surely, a prudent evaluation of the credibility of the facts and circumstances presented in the Article should reasonably have included contact with the sole person complained about in Kranert's "*grievance*" - a person who was, as respondents claim, the "public official" and "*manager*" over Kranert, the "public official" named on Kranert's "*lawsuit*" and the "*manager*" of the "*finance office*" which was, according to the Article, implicated in some way with "*improper*" "*financial practices*" involving, according to the Newspaper's Editor, illegal pay-offs by "*vendors*" (A11, ¶3). The Newspaper apparently did not check their facts, and, though they apparently had contact with Kranert, they did not bother to contact petitioner. The Newspaper departed from acceptable investigative standards in the publishing of that Article.

Factual Errors in the Article

25. The Article contains many erroneous statements of fact which are in conflict with or which do not appear anywhere in the "*lawsuit*" or the "*grievance*" the Newspaper claims to be reporting on: 1) The Article falsely claims, two times, that Kranert has a degree in accounting (A7, ¶¶ 6&10), which emphasized the false 'financial impropriety' tenor of the Article. In truth, Kranert does not have a degree in accounting and his accounting skills were very limited. 2) Kranert's "*grievance*" was not about hockey tickets or other financial improprieties, as the Article implied and the Editor claimed; in fact, Kranert's lawsuit expressly states that "*Kranert filed a grievance with AFSCME regarding the working conditions in the Financial Services Department at FSH,*" and the Newspaper's Motion to Dismiss states that Kranert "*filed a grievance concerning Smith's management style.*" 3) Kranert was never "*told,*" nor does his grievance or law suit ever claim that..."*Kranert was told that he had created 'problems in the workplace,' so it would be better if he worked at 'an un-air-conditioned storehouse'*" (A7, ¶9) (see #32 below). And all of the above erroneous statements of fact reinforced the erroneous gist and tenor of the Article, that Kranert was retaliated against and mistreated for his reporting to the governor of "*financial*" improprieties in petitioner's office.

"The Fair Reporting Privilege"

26. Citing Huszar v Gross, 468, So. 2d 512, 516 (Fla.1st DCA 1985), the lower court order stated... "*In Florida there is a qualified privilege, the Fair Reporting Privilege, to publish reports concerning judicial proceedings.*"

27. However, at 512, the cited case, Huszar, states "*Qualified privilege exists to make reports of judicial and quasi-judicial proceedings, as long as they are accurate, fair, and impartial, and the privilege extends*

*as well to protect remarks of counsel.*" (Underlines added.)

28. The Newspaper Article was published prior to any "judicial action" taking place. See Restatement 2nd of Torts V.3, § 611 (*e*) 1977. Further, the Article was neither "*accurate,*" nor "*fair,*" nor "*impartial.*"

a. The Article was not accurate

29. To begin with, the Article (A7, ¶10) quotes directly from page 15 of Kranert's 18 page lawsuit Complaint, indicating that the reporter had read Kranert's lawsuit Complaint. Kranert's grievance, which was solely against petitioner, was attached to his Complaint as Exhibit "G." It is inconceivable that a reporter could have innocently transformed the allegations of either of those documents into a "*complaint about financial practices at Florida State Hospital*" (A7, ¶14), which, in the Newspaper's mind, concerned pay-offs by vendors.

30. Further, if the Democrat were truly reporting on the judicial proceeding as they claim, they could not have made so many references to improper "*financial practices,*" and "*improper practices in the finance office,*" supported by false statements that Kranert has a "*degree in accounting,*" as nowhere in Kranert's lawsuit or his grievance - which gives Kranert's entire educational background - are there claims of "*accounting degrees*" or allegations of "*improper*" "*financial practices*" in the "*finance office*" managed by petitioner, which was the gist and tenor of Cotterell's Article and the implied starting point of Kranert's employment problems. In fact, Kranert's lawsuit expressly states, that "*Kranert filed a grievance with AFSCME regarding the working conditions in the Financial Services Department at FSH*" (Underline added), and the Newspaper has already admitted that their repeated claims that Kranert had a degree in accounting were not accurate (A11, ¶3).

31. Further, Kranert's lawsuit clearly states that "*some person other than* [Kranert] *provided the Governor's staff with a copy of the grievance,*" which was about

"*working conditions in the Financial Services Department at FSH.*" And, Kranert, who was available to the *Democrat*, has stated that Searcy had faxed that grievance to the governor. The Article was not an "accurate" report on a judicial proceeding.

b. The Article was not fair

32. Surely, professional journalists and news organizations understand the importance of proper use of quotation marks. Bill Cotterell's bio states that he has over 30 years experience in journalism, including many years at UPI and over 15 years at the *Tallahassee Democrat*. Considering his experience, Cotterell's creative juxtaposing of two widely separated allegations of Kranert's lawsuit into one thought or message cannot be seen as unintentional, and it distorted the truth and was misleading to readers. Cotterell wrote...

> *Soon after the governor's office inquired about his complaint, Kranert was told that he had created "problems in the workplace,' so it would be better if he worked at "an un-air-conditioned storehouse"* (Underlines added, quotation marks as published). (A7, ¶9)

Those two phrases lifted from Kranert's lawsuit ("*problems in the workplace*" and "*un-air conditioned storehouse*"), appear a full five sentences apart in Kranert's lawsuit Complaint. Further, the narrative between those two sentences in Kranert's lawsuit Complaint is very clear that those two separate allegations involved separate events under different supervisors at different locations of the hospital. Cotterell clearly intended to present those two widely spaced allegations as occurring in one conversation. Also, the word "*so*" as used by Cotterell is reasonably understood to mean '*and because of that.*' The linking of the two phrases with the word "*so*" is reasonably understood as being what Kranert's manager, the petitioner, had "*told*" him. Restatement 2nd of Torts V.3, § 611 (*f*) 1977, "*Thus, although it is unnecessary*

*that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it."*

33. And, Cotterell manipulated another quote in such a way that it took on a totally different meaning. In quoting the Hospital Administrator, Cotterell wrote:

> *Williams declined comment, saying "it's not appropriate to try litigation in the paper." But he did say "there's not one scintilla of truth about any retaliation" against Kranert for his complaint about financial practices at Florida State Hospital.*
>
> (Quotation marks shown as published).(A7, ¶14)

Why did Cotterell add - *for his complaint about financial practices at Florida State Hospital* - to what the Administrator said? Apparently, there was a strong desire on Cotterell's part to imply "*financial*" wrongdoing when reporting on Kranert's "*grievance*" or "*complaint*" against this petitioner, even though neither the grievance nor the lawsuit, nor anyone else, had ever made allegations of financial wrongdoing against petitioner or her department. If Cotterell had ended the sentence after "*retaliation,*" where the quote ended, or after "*against Kranert,*" or even after "*for his complaint,*" where it 'fairly' should have ended, there could be no valid objection raised by petitioner on that particular point. The Restatement 2nd of Torts V.3, § 611 (*f*) 1977 states... "*The reporter is not privileged under this Section to make additions of his own that would convey a defamatory impression, nor to impute corrupt motives to any one, nor to indict expressly or by innuendo the veracity or integrity of any of the parties.*"

c. The Article was not impartial

34. Also, the Newspaper's Motion to Dismiss expressly states..."*the article involves criticism of public officials within their governmental roles, and is thus constitutionally protected speech.*" And, the Editor's letter (A11, ¶5) expressly states that the Article contains "*opinion and/or judgement.*" The Newspaper's

admission that the Article contained "*criticism*," "*opinion and/or judgement*" is fatal to the "*impartiality*" requirement for privilege in reports on judicial proceedings.

35. The Article contained information that was obviously obtained through interviewing Kranert. And though the Editor's letter (A11, ¶3) evidences that the Article meant to describe Kranert's "*grievance*," and though petitioner was the sole subject of that "*grievance*," the Newspaper made no attempt to contact petitioner either before the Article was published or even after they received petitioner's 9-14-98 letter of complaint (A8). The lack of "*impartiality*" is further evidenced in Cotterell's biased commentaries: "*Even in the stilted language of the law, his experience reads like a Gothic horror story*" (A7, ¶3), and "*There the man with degrees in law and accounting counted linens, paint cans and bed pans*" (A7, ¶10). These statements appear nowhere in either the "*grievance*" or the "*lawsuit*," and their inclusion in the Article violates Huszar's (*supra*) "impartiality" requirement.

36. The Democrat Article was a mixture of some truths, some blatantly false statements, some interview of Kranert while not trying to contact petitioner, some vague reference to a lawsuit, and some inaccurate or purposefully misleading quotes – all designed to present the reader with a picture of the matter that was very different from what the grievance and lawsuit were truly about. The Article was not an "impartial" report on a "judicial proceeding." Where the truth is distorted or presented in an obviously misleading fashion, it is no defense. Burton v. Crowell Publishing Co., 82 F 2d 154 (2d Cir. 1936).

The Newspaper Abused its Privilege

37. This was not the "fair reporting" on a "judicial proceeding," nor was it a report on a claim made by Kranert in his lawsuit or grievance, as the charge of financial improprieties does not appear anywhere but

in the Newspaper Editor's letter to me (A11) and in the *Democrat* Article (A7), which the Editor claims was a "*description of that grievance*" (A11, ¶3). This was the publishing of Kranert's tale of woe, which was created by a purposeful and skillful manipulation of quotation marks and juxtaposed phrases, embellished with biased commentary and admitted "*errors*," "*criticism*," "*opinion and/or judgement*," which compelled readers to conclude that Kranert, "*the man with degrees in law and accounting*," was retaliated against and punished for exposing and reporting financial improprieties in petitioner's office. The Article was not a "fair" report on a judicial proceeding, and it was very damaging to the petitioner's reputation. The Newspaper abused its privilege by presenting the information in such a manner that it conveyed an erroneous impression. See Restatement 2nd of Torts V.3, § 611 (*f*) 1977.

Privilege is a Question for the Jury

38. Further, petitioner had disputed whether the Fair Reporting Privilege applied in the instant case, hence this presented a question for jury involvement. "[W]*here the evidence is disputed as to the existence or nonexistence of a privilege there is a mixed question of law and fact, and the fact issue is to be determined by the jury.*" Schreidell v. Shoter 500 So.2d 228, *231 (Fla. 3rd DCA 1986). And, citing Curtis Publishing Co. v. Fraser, 209 F.2d 1 (5th Cir.1954); Lewis v. Evans, 406 So.2d 489 (Fla.2d DCA 1981) and Drennen v. Westinghouse Electric Corp., 328 So.2d 52 (Fla. 1st DCA 1976), the Florida 3rd DCA in Glickman v. Potamkin, 454 So.2d 612, *613, (Fla. 3rd DCA, 1984) held that "*In a defamation action, the affirmative defenses of truth, good motive and qualified privilege present factual questions for resolution by the jury.*" And, in Hartley & Parker v. Copeland, 51 So.2d 789, *790 (Fla. 1951), the Florida Supreme Court held...

> "*But, when all the essential facts and circumstances are not conceded, the existence or nonexistence of the privilege should be determined by the jury from*

*all the facts and circumstances of the case, under proper instructions of the court applicable to the case. Jones v. Townsend['s Adm'x] 21 Fla. 431, 58 Am.Rep. 676; Montgomery v. Knox, 23 Fla. 595, 3 So. 211; Jones v. Greeley, 25 Fla. 629, 6 So. 448; Eldridge v. State, 27 Fla. 162, 9 So. 448; Coogler v. Rhodes, 38 Fla. 240, 21 So. 109, 56 Am.St.Rep. 170."*

Petitioner is not a Public Official

39. Though this Court has not specifically defined "public official," it has said that the term does not encompass all public employees. Hutchinson v. Proxmire, 443 US 111, note 8 (1979). In describing a "public official," this Court has stated, "*There is, first, a strong interest on debate on public issues, and, second, a strong interest on debate about those persons who are in a position significantly to influence the resolutions of those issues*" Rosenblatt v. Baer, 383 US 75, 85, 86, S.Ct. 669, 676, 15 L.Ed.2d 597, 605 (1966). And, citing Wolston v Reader's Digest Ass'n, Inc., 443 U.S. 157, 167-68 (1979), the court in Michaelis v CBS, Inc., 119, F.3d 697 Media L. Rep. (8th Cir. 1997) noted that the defendants bear the burden in establishing the "public official" status of the plaintiff and, citing Rosenblatt v Baer, *supra*, that the issue is reviewed *de novo* as a matter of federal law. The Newspaper in the instant case never gave any argument or evidence to show how petitioner fits the profile of a "public official," as this Court or other case law has described "public official." The Newspaper's argument was, in its entirety,

"*Smith describes herself as a supervisor, the Director of the Finance Office, and the person responsible for the Finance Office. Thus, Smith by her own admission falls within the definition of a public official.*"

40. Citing Stewart v. Sun Sentinel Co., 695 So. 2d 360, 361 (Fla. 4th DCA 1997), the lower court order stated... "*A public official is an individual who has, or*

*appears to have, substantial responsibility for or control over the conduct of government affairs.*" Stewart, which involved a correctional officer, quoted from Smith v Russell, 456 So.2d 462 (Fla.1984), which involved a police officer and which characterized a patrolman as a "*highly visible representative of government authority who has power over citizens and broad discretion in the exercise of that power*" (Underlines added).

41. To begin with, neither Kranert's grievance nor his lawsuit involved "*public issues.*" And, defendants have not shown that petitioner is in a position to significantly influence the resolution of "public issues," nor have they shown that petitioner has the "*visibility,*" the "*power,*" or the "*discretion*" associated with a "public official."

Petitioner's position was not "Highly Visible"

42. Petitioner was neither elected nor appointed; she competed with others for an advertised employment position which was at the *very low* end of both the State of Florida and the Department of Children & Families organizational charts. That position did not "*invite public scrutiny and discussion of the person holding it*" Kassel v Gannett Co., (infra).

43. Petitioner did not have direct contact with the public or with the patients or their families. Even if the Newspaper had identified petitioner by her full name, the public, as well as the vast majority of her fellow employees in the State of Florida, as well as a great number of employees at the state hospital which employs her, would not have known who "Denise Smith" is. Surely a person who is not known by many outside of those she knows and works with, cannot be judged to be a "public official" without some other compelling factor to qualify her. The Newspaper has presented none.

Petitioner's position had no "Power" or "Discretion"

44. Though petitioner had the title of "Director," exercise of "*discretion*" in the performance of her duties would be grounds for firing. Petitioner supervised

employees of an accounting department at one of the many facilities operated by the state, and as the Director of the finance office, petitioner was expressly prohibited from hiring, terminating, setting the salary, taking disciplinary action or giving a raise or promotion to any employee - even an entry level or temporary employee - without the express written approval of her supervisors. Petitioner did not deal with vendors or award contracts. Petitioner's position was required to carry out accounting duties at the hospital within strict financial policy guidelines set down by the legislature and policy makers which expressly prohibited exercise of control over the conduct of government affairs. She did not influence or make that policy, nor was she permitted to change guidelines. Her "responsibility" was to stay within the regulations governing everything she did from the supervision of other state employees to the accounting handled in her office - and, the accounting handled in her office was a very small part of that performed in connection with the hospital as a whole, which, in turn, was a mere fragment of the accounting for the Department of Children & Families, and even a smaller part of the statewide accounting. Moreover, if any issue arose that appeared to be outside of existing guidelines concerning any accounting or employee matter, petitioner was required to seek direction from a superior before proceeding. Even when money owed to the hospital was delinquent, petitioner could only report the delinquency to Hospital Legal Counsel who determined whether collection would be pursued.

45. It is significant that the lower court in the instant matter ruled that petitioner is a public official, while in a different suit in that same courthouse - the lawsuit the Newspaper claims to be reporting on - the judge dismissed this petitioner from Kranert's lawsuit stating that petitioner did not have the authority to affect Kranert's employment.

Access to Channels of Communication

46. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 41 L.Ed. 2d. 789 (June 25, 1974) Justice Louis Powell, jr. gave the opinion for the Court. At 344, Justice Powell wrote: "*The first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.*"

47. It has been made abundantly clear to me that my position as "Director" did not include either "*access to channels of effective communication*" or the "*opportunity to counteract false statements*" referred to by Justice Powell in Gertz.

48. With respect to access to channels of communication, I was explicitly instructed by my superiors, both verbally and in writing (A14 & A15), to not contact the Newspaper in response to Cotterell's email (A12) requesting "public records" on me in relation to his threat to investigate me immediately prior to the lower court's order granting the Newspaper's Motion to Dismiss. I had specifically requested (A16) of my superiors that Cotterell be supplied with the information which would counteract the false statements. The records were not supplied to Cotterell and I was informed that the matter had been handled as my superior's "*deemed appropriate*" (A17). (This incident is discussed in detail later. See #65 below.) It was made abundantly clear to me that "access" and "opportunity" to refute the lie were not options available to me. In fact, contacting Cotterell would have been a violation of a direct order from my supervisor and, as such, grounds for firing.

49. That same denial of access "*to contradict the lie or correct the error*" was evident when I was officially reprimanded for defending myself against another of Kranert's false accusations against me. Though I had never had even one complaint filed against me in the 11 years I worked at the hospital, within 6 months from the time Kranert was demoted into my department - and for the following 2 years he was out of my department - Kranert continued his diligent campaign to destroy my reputation by filing over sixteen false complaints against me. The reason given for my official reprimand, my first demerit in the 28 years I had been in the workforce, was that the evidence I had submitted in my defense was "unsolicited." Petitioner respectfully suggests that the conditions of petitioner's employment are in direct conflict with the "public official's" "*access to channels of effective communication*" and "*opportunity to counteract false statements*" referred to by Justice Powell.

50. Moreover, the Newspaper had no interest whatsoever in petitioner or what she had to say on the matter they were reporting on, further evidencing petitioner's lack of access to the channels of communication, and that the Newspaper itself did not believe that petitioner was a person in a position with "*substantial responsibility for or control over the conduct of government affairs.*"

The Newspaper did not treat Petitioner as a "Public Official."

51. The Newspaper, itself, did not treat petitioner as a "public official" in the preparation, writing or publication of the Article, nor did they treat her like a "public official" when they didn't even acknowledge receipt of petitioner's first letter (A8) objecting to the Article they permitted Kranert to speak through. It must be remembered that the Newspaper reported on a "*grievance*" by Kranert that was solely about petitioner. And, according to the Editor's letter (A11),

the Newspaper was reporting that that grievance was about "improper practices" in petitioner's office concerning vendor pay-offs (A11, ¶3). And, since the Newspaper considered petitioner to be a "public official," their interest in her comments on this subject would have been extremely high. But, the Newspaper did not contact petitioner in the preparation of the Article, and it did not return her first contact advising that the grievance was not about "financial improprieties." Surely, had the Newspaper truly believed that petitioner was a "public official" - the "public official" complained about in the "*grievance*" or "*complaint*" they wrote about, the "public official" on the "*lawsuit*" they claim they were reporting on, and the "public official" who was, in their mind, connected in some way with vendor 'pay-offs,' they would have responded in some way. But, the Newspaper had no interest whatsoever in petitioner's advice that the Article was false, and they had no interest in what she had to say about an Article they admit intended to portray that petitioner's office was involved in financial improprieties. The Newspaper's actions refute their claim that petitioner is a "public official."

52. In discussing precedent from the U.S. Supreme Court on the question of who is a "public official," the court in Kassel v Gannett Co., 874 F2d 935, 16 Media L R 1814, 28 Fed Rules Evid Serv 488, described "*the three legs of the doctrinal stool*" distinguishing the "public official" as: 1) "*character of employment*," 2) "*assumed risk*" and 3) "*access to means of self help.*" Petitioner respectfully suggests that the job duties and opportunities available to public employees in petitioner's position do not meet even one of the three criteria suggested by this Court in gauging whether a person is a "public official."

The Matter Should Be Remanded

53. Petitioner respectfully suggests that, even in the unlikely event this Court deems that public employees in petitioner's position are "public officials," this case

should be remanded based on the proposition that, even if the claim falls within the New York Times rule, plaintiff might be able to present a jury question of actual malice. See U.S.C.A. Const. Amends. 1, 14. Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669 (1966)

The Article was "Of and Concerning" Petitioner

54. Though a jury trial was requested, citing Thomas v. Jacksonville Television, Inc., 699 So. 2d 800, 805 (Fla. 1st DCA 1997) - a class action brought on behalf of 436 net fishermen - the lower court decided all issues of fact and determined that..."*The Article was not of and concerning Smith. The Article does not mention Smith by name or title, nor does it describe her. Therefore, the Article cannot form the basis of a libel action against the Democrat by Smith.*" (A1, pg2, #3)

55. However, the Thomas court also noted the Restatement 2nd of Torts § 564...

> "*One who publishes defamatory matter concerning group or class of persons is subject to liability to individual member of group or class if, but only if, group or class is so small that matter can reasonably be understood to refer to member, or circumstances of publication reasonably give rise to conclusion that there is particular reference to member.*"

56. In the instant case, Kranert had only one "*manager*" against whom he filed the "*grievance*," also referred to as the "*complaint*" in the Article. A number of people at the hospital knew that the "*grievance*" identified in the Article was the "*complaint*" the "*Governor's Office inquired about*," and they also knew that that "*grievance*" was against petitioner, and only petitioner.

57. Moreover, Florida case law is clear that the defamed person need not actually be named in the words at issue if the communication as a whole contains facts or references from which injured persons may be identified by persons receiving the communication. See Harwood v Bush, 223 So.2d 359

(Fla. 4th DCA 1969). And, in O'Neal v. Tribune Company, 176 So. 2d 535 (Fla. 2nd DCA 1965), the Florida 2nd DCA, citing 33 Am. Jur., Libel and Slander, section 89, page 102 as well as 91 A.L.R. 1161, 1163, held that:

> "*It is not essential that the person defamed be named in the publication if, by intrinsic reference, the allusion is apparent, or if the publication contains matters of description or reference to facts and circumstances from which others may understand that he is the person referred to, or if he is pointed out by extraneous circumstances so that persons knowing him can and do understand that he is the person referred to; and it is sufficient if those who know the plaintiff can make out that he is the person meant.*"

58. The Newspaper Article (A7) appeared in the "Local & State" section of the *Tallahassee Democrat*, in the "NOTEBOOK" column under "Bill Cotterell, STATE AGENCIES." Cotterell's bio states that he specializes "*in stories of interest to state employees.*" The target audience of that Article consisted of the people most likely to know petitioner, or know of her. The publication contained many descriptions or references to facts and circumstances from which others would identify petitioner. Petitioner's family, friends and neighbors, as well as people she worked with in state government, including her superiors at the hospital and those who worked in her department, immediately connected "Denise Smith" to the Article when it referred to Kranert's "*manager*," or to Kranert's "*complaint*" or "*grievance*," which was solely about petitioner, or to the "*finance office*" she managed, or to Kranert's "*lawsuit*" which named her as a defendant. Many more people knew about the "*grievance*" or "*complaint*" than normally would, because Kranert's co-defendant in the instant case, Wendy Searcy, had rented a 4ft X 8ft towable sign at the entrance to the hospital which publicized the matter, and because

Searcy had faxed Kranert's grievance, to the Governor's office and other high state offices, from where it traveled down through various departments in Florida government until it reached petitioner's supervisor and petitioner at the hospital. Because of these events, those who knew of petitioner - and even those who did not know her before the publication and publicity - now read the Article to say that Kranert, a man with a degree in accounting, complained about "*financial practices*" and "*improper practices in the finance office*" Denise Smith manages. They read, "*Kranert, the fired guy now suing the Department of Children and Families* [and Denise Smith]." They read, "*Last September, he moved to a job as an accountant* [under Denise Smith]" and that "*In May he filed a grievance* [against Denise Smith] *over what he considered improper practices in* [Denise Smith's office]" and they read that "*Soon after the Governor's Office inquired about his complaint* [against Denise Smith] *Kranert was told* [by Denise Smith] *that he had created problems in the workplace so it would be better if he worked at an un-air-conditioned storehouse.*" They read that the Hospital Administrator "*Williams declined comment saying there is not one scintilla of truth about any retaliation against Kranert for his complaint* [against Denise Smith] *about financial practices* [in the department Denise Smith manages] *at Florida State Hospital.*" To those who know or know of the plaintiff, the Article was "of and concerning" Denise Smith, and it libeled her.

The Demand for Retraction

59. Every single item petitioner advised the Newspaper was in error, could have been checked and found to be in error through examination of the two documents which the Newspaper claims to be reporting on and which the Newspaper quoted from. And even more significant, the Newspaper had access to Lawrence Kranert, the person they claim had the "*accounting degree*," the author of the "*grievance*" or

"*complaint*" the Newspaper reported on, the plaintiff in the "*lawsuit*" against petitioner which the Newspaper claims to be reporting on, and the person the Newspaper Article was generally about. The Newspaper should have wanted to accurately report on the matter. Instead, they spurned petitioner's request and intimidated her. In his letter to petitioner (A11, ¶3), the Editor admits to at least one inaccuracy in the Article (that Kranert has "*a degree in accounting*"), but he claimed that that was "*an extremely minor mistake*" that "*doesn't warrant a correction.*" That admitted "*mistake,*" a mistake that was reported <u>two</u> <u>times</u> in that short Article, is not minor at all when taken in context of the Article's (A7) reporting that Kranert had filed a "*complaint about financial practices at Florida State Hospital,*" and that "*the governor's office inquired about*" Kranert's "*grievance over what he considered improper practices in the finance office*" managed by petitioner. It is extremely important whether the person making the charges is a layperson or one degreed in the field of his complaints. In the former it would simply be mudslinging, while in the latter it would be viewed by the Newspaper's readers as a credible assessment by a recognized expert. The Newspaper's "*mistake*" over an item that could be so easily checked was bad enough, but their cavalier attitude about this error and their refusal to make a correction is inexcusable in light of the impact that admitted "*mistake*" had on the credibility of the Article's theme: that a 'degreed accountant' had uncovered "*financial*" improprieties in petitioner's accounting office.

<u>Right to a Jury Trial</u>

60. Though a jury trial was requested, the lower court judge decided all of the issues of fact that were in controversy and, based on those decisions, dismissed petitioner's Complaint on the Newspaper's first Motion to Dismiss.

*"The right to jury trial is most clearly violated when a judge abrogates to herself the fact-finding function, which is generally the jury's province."* State Constitutional Law: Litigating Individual Rights, Claims, and Defenses, by Jennifer Friesen, second edition, § 6-3(d)(1)

**REASONS FOR GRANTING THE WRIT**

61. This case has great interest beyond the private interests of the parties, and it presents issues whose resolution will affect many other cases and have practical consequences for hundreds of thousands of low level public employees, hence our nation as a whole.

62. Petitioner does not dispute the importance of a free press or that our free press must have certain "privileges" to be an effective part of our democratic society. However, it is equally important to our democratic society that the individual has both the right and the opportunity to protect his reputation, hence his/her wage earning ability, when the press abuses their privilege. It is also important to the hundreds of thousands of public employees who will be negatively impacted by the lower court ruling, that case law not be created that would condone a level of privilege exceeding what this Court has deemed appropriate, as that would unfairly strip these individuals of the opportunity to defend their reputations against negligent defamatory attacks. Justice Harlan made the point well in Curtis Publishing Co. v Butts, 388 U.S. 130 (1967)...

*"The resolution of the uncertainty in this area of libel actions requires, at bottom, some further exploration and clarification of the relationship between libel law and the freedom of speech and press, lest the New York Times rule become a talisman which gives the press constitutionally adequate protection only in a limited field, or, what would be equally unfortunate, one which goes far to immunize the press from having to make just reparation for the*

*infliction of needless injury upon honor and reputation through false publication."*

63. Petitioner respectfully suggests, that it is patently unfair to ask public employees in petitioner's rank - where they have no control over government affairs and where they are expressly told that they must not defend themselves - to meet the same standards as the Governor, the Attorney General and other high ranking officials. Though the issue of public official has been addressed on a number of occasions by this Court, ambiguity and inconsistency in lower court decisions regarding "public official" versus "public employee" persists permitting this petitioner and many hundreds of thousands of public workers in our country who are unknown to the public, who have no access to channels of communication, and who are expressly prohibited from contacting the media, and whose jobs expressly prohibit discretion or control over the conduct of governmental affairs, to be adjudged "public officials," unfairly stripping us of the opportunity to protect our reputations against negligent defamatory attacks. Low level government employees are particularly vulnerable to the devastating effects of defamatory attacks in that they likely do not have the community influence or the finances to overcome the resulting negative impact of the defamation on their current and future employment, hence their ability to earn a living.

The Media's Vast Power Must Be Balanced

64. Both this Honorable Court and the Florida courts have recognized the vast power of the media and the importance of protection of the individual's reputation. In Rosenblatt v. Baer, 383 U.S. 75, S.Ct. 669, 679, 15 L.Ed. 2d 597, Justice Brennan, delivering the opinion for the Court (at 86) stated..."*Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."* and in a concurring opinion, Justice Potter Stewart (at 92) stated..."*The right of a man to the protection of his own reputation from*

*unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.*" And in The Miami Herald Publishing Co. v. Ane, 423 So.2d 376, *387 (Fla. 3rd DCA 1982), Chief Judge Hubbart of Florida's 3rd District Court of Appeal wrote.

> "*Still, we cannot help reflecting that the defamation action, properly limited, also plays an important role in a free society as it represents the individual's sole remedy against the occasional excesses of the print and electronic media which often have vast resources to inflict untoward damage upon an individual. Surely, a decent, open society cannot, in the name of press and speech freedom, so thoroughly undermine this remedy as to render it useless to those people who have been damaged by a defamatory falsehood negligently uttered in the mass media and have not in any way sought the public limelight.*"

65. The Newspaper's power to intimidate and profoundly affect a public employee's life, employment and health was evident in an event that took place after all arguments had been presented, but only days prior to the lower court dismissing all charges, including conspiracy, against the *Democrat*. On or about 9-1-00, respondent Bill Cotterell - obviously fully cognizant of his relationship with petitioner and his co-defendant Searcy in the instant law suit, and knowing that I was on vacation, and knowing that what he intended to investigate did not involve "hot news" - emailed my supervisor stating that he intended to investigate me for "*allegations of mismanagement, morale problems or other irregularities*" (A12), and that he was eager to drive the 100 mile round trip to the hospital to do that. Those "*allegations*" had been contained in an anonymous letter to Hospital Administration. And though Cotterell writes that he already had contact with employees

(note the plural), Cotterell by-passed all of the supervisors of the department and made contact with only one entry level employee out of 20 staff, Wendy Searcy, Cotterell's co-defendant in the instant lawsuit (A18). Cotterell surely should have done some preliminary work prior to sending off such an alarmingly worded contact to my supervisors, and he surely must have considered that such a negatively worded contact from a newspaper reporter would have a negative impact on anyone's employment. Petitioner, not yet knowing about Cotterell's contact, supplied all employees, including Searcy, with a written reply to the charges. On the very next day, Cotterell retracted his threat to investigate me saying his computer had "crashed" and he wasn't sure his email had been received, that it was not a "hot topic" and that he had placed the story on the "back burner" (A13). But, the damage had already been done. The state acted as one would expect. As a proximate result of Cotterell's contact, I was removed from my position. I, a person who was deemed by the lower courts to be a "public official," was specifically instructed, on two occasions, to not make contact with Bill Cotterell about the matter (A14 and A15), and my superiors refused to forward my response to the charges to Cotterell saying that the matter had been handled as my supervisors deemed appropriate (A17). The events became intolerable. I went into a deep depression. I, a person with a record of working long hours including Saturdays, Sundays and holidays, was unable to work for two months, during which time I lost 35 lbs. That is the profound impact a newspaper can have on a public employee's life by the mere suggestion of an investigation.

## CONCLUSION

66. For all of the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
Denise Smith, petitioner
198 Cairo Road
Bainbridge, GA 31717
(229) 246-7852

## APPENDIX INDEX

A1 Circuit Court for the Second Judicial Circuit, Leon County, Florida, Case #00-848, Order Dismissing Complaint Against Defendants Democrat and Cotterell With Prejudice - ordered and adjudged 9-11-00.

A2 District Court of Appeal, First District, State of Florida, Case #1D00-3928, Per Curiam Affirmed on 7-3-01.

A3 Florida First District Court of Appeal, Appellant's Motion for Rehearing, Clarification, and Certification denied on 9-26-01.

A4 Supreme Court of Florida, Case #SC01-2223, Acknowledgement of New Case, dated 10-22-01 and review denied 10-22-01.

A5 Circuit Court for the Second Judicial Circuit, Leon County, Florida, Case #00-848, 6-25-01, Order dismissing Complaint against defendant Searcy with prejudice - (currently on appeal before the Florida First District Court of Appeal Case #1D01-2947.)

A6 Extension of time to file this Petition for a Writ Certiorari granted by Justice Kennedy on 1-4-02.

A7 8-31-98 Tallahassee Democrat Article written by Bill Cotterell.

A8 9-14-98 letter from petitioner to the Newspaper objecting to the Article.

A9 9-14-99 letter from petitioner serving statutory notice on the Newspaper.

A10 10-19-99 letter from petitioner to the Newspaper Editor complaining about the abusive contact.

A11 10-20-99 letter from the Newspaper Editor outlining the Newspaper's understanding of what the Article was about.

A12 9-1-00 email from Bill Cotterell to petitioner's supervisor requesting public records and advising he intended to investigate petitioner.

A13 9-13-00 email concerning Bill Cotterell's retraction of his 9-1-00 request to investigate petitioner.

A14 9-7-00 email instructing me that Bill Cotterell should not be contacted.

A15 9-15-00 email instructing me to not contact Bill Cotterell.

A16 9-18-00 email from petitioner requesting that Hospital Administration comply with Bill Cotterell's 9-1-00 public records request regarding me.

A17 9-21-00 email advising me that the Hospital Administrator had handled the matter of Bill Cotterell's threatened investigation of petitioner as she "deemed appropriate."

A18 Bill Cotterell's contact with his co-defendant Searcy and no other employee regarding his threatened investigation of petitioner.

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA
CASE NO. 00-848

DENISE SMITH, Plaintiff,

V.

LAWRENCE F. KRANERT, et al, Defendants.

ORDER DISMISSING COMPLAINT AGAINST DEFENDANTS DEMOCRAT AND COTTERELL WITH PREJUDICE

THIS CAUSE is before the Court on the Motion to Dismiss Plaintiffs Complaint filed by Defendants Tallahassee Democrat, Inc., and Bill Cotterell (collectively referred to as "Democrat"). Having heard argument from all appropriate parties, having considered all memoranda filed by the parties, and being otherwise fully advised on this matter, the Court hereby rules as follows:

1. This Complaint should be dismissed with prejudice for various reasons, each of which independently support dismissal. Dismissal with prejudice is appropriate because of the chilling effect these types of cases have on freedom of speech and freedom of press. See From v, Tallahassee Democrat. 400 So. 2d 52, 58 (Fla. 1st DCA 1981).

2. The initial determination of whether a particular statement is libelous is a question of law for the court to decide. See Ross v. Gore, 48 So. 2d 412, 416 (Fla. 1950). Libel is a false written statement that injures the reputation of another. As a matter of law, the newspaper article appearing August 31, 1998 in the Tallahassee Democrat written by Bill Cotterell entitled

"By whatever job title he has now, he is trouble," ("Article") did not libel the Plaintiff, Denise Smith ("Smith"). The Article is neither false, nor does it damage the reputation of Smith.

3. In order to state a cause of action for libel Smith must show the alleged defamatory statements are of and concerning her. See Thomas v. Jacksonville Television. Inc.. 699 So. 2d 800, 805 (Fla. 1st DCA 1997). The Article was not of and concerning Smith. The Article does not mention Smith by name or title, nor does it describe her. Therefore, the Article cannot form the basis of a libel action against the Democrat by Smith.

4. In order to pursue a cause of action for defamatory statements, a public official must allege and prove actual malice with clear and convincing evidence. See New York Times Co v. Sullivan. 376 U.S. 254, 279-281 (1964). Actual malice is publication with knowledge of its falsity, or reckless disregard to its falsity. See id. A public official is an individual who has, or appears to have, substantial responsibility for or control over the conduct of government affairs. See Stewart v. Sun Sentinel Co.. 695 So. 2d 360, 361 (Fla. 4th DCA 1997). Smith has alleged that she is the Director of the Finance Office at the Florida State Hospital (Compl. ¶133), the person responsible for the finance office (Compl. ¶133), and a supervisor (Compl. ¶137). Therefore, this Court finds Smith is a public official. As a public official. Smith must prove actual malice on the part of the Democrat. As the Article is a substantially accurate report of a lawsuit filed by Larry Kranert (Case No. 98-4198), Smith cannot prove actual malice on the part of the Democrat. The Democrat did not publish the Article with knowledge of its falsity or with reckless disregard for its falsity, as the Article truthfully reports the allegations in Mr. Kranert's lawsuit in all material aspects. Therefore,

Smith cannot state a cause of action against the Democrat.

5. In Florida there is a qualified privilege, the Fair Reporting Privilege, to publish reports concerning judicial proceedings. See Huszar v. Gross. 468 So. 2d 512, 516 (Fla. 1st DCA 1985). The privilege protects reports that are fair and substantially accurate. See id. Courts routinely decide the applicability of the privilege on a motion to dismiss. See id. The Article reports on an official judicial proceeding, specifically Kranert v. Florida Department of Children and Families (Case No. 98-4198). The Article is a substantially accurate report of the allegations in the above referenced case, and therefore is protected by the Fair Reporting Privilege. As the Article is protected by the Fair Reporting Privilege, it cannot be the basis of a libel action against the Democrat by Smith.

6. As Smith cannot state a cause of action for libel against the Democrat, there can be no conspiracy to libel by the Democrat. See Wright v. Yurko. 446 So. 2d 1162, 1164-65 (Fla. 5th DCA 1984).

7. Smith's action is grounded in libel; therefore it may not be transformed into a cause of action for intentional affliction of emotional distress absent an independent tort by the Democrat. See Fridovich v. Fridovich. 598 So. 2d 65, 70 (Fla. 1992)(plaintiff may not transform defamation action into claim for intentional affliction of emotional distress by characterizing the alleged defamatory statements as outrageous). There is no independent tort in this action. Therefore, Smith cannot state a cause of action for intentional affliction of emotional distress against the Democrat.

THEREFORE, the Court orders as follows:
a.) Count II - Media Libel against the Democrat is hereby dismissed with prejudice;
b.) Count III - Conspiracy to Libel against the Democrat is hereby dismissed with prejudice; and
c.) Count IV - Harassment and Intentional Causing of Emotional Distress against the Democrat is hereby dismissed with prejudice.

ORDERED AND ADJUDGED this
11 day of September 2000.

s/NIKKI CLARK, Circuit Court Judge

Copies Furnished to:
Michael J. Glazer
C. Gary Williams
Ken Abele
Ausley & McMullen
P.O. Box 391
Tallahassee, FL 32302

Denise Smith
198 Cairo Road
Bainbridge, Georgia 31717

Andrew Byrne
1358 Thomaswood Drive
Tallahassee, FL 32302-1877

Jerry G. Traynham
P.O. Box 4289
Tallahassee, FL 32303

John S. Derr
P.O. Box 3741
Tallahassee, FL 32315-3741

IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D00-3928

DENISE SMITH, Appellant
v.
TALLAHASSEE DEMOCRAT and BILL COTTERELL, Appellee.
_____/

Opinion filed July 3, 2001.

An appeal from the Circuit Court for Leon County. Nikki Ann Clark, Judge.

Denise Smith, Pro Se, for Appellant.

Michael J. Glazer and Ken Abele, of Ausley & McMullen, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

ERVIN, MINER and BROWNING, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

September 26, 2001

CASE NO.: 1D00-3928
L.T. No. : 00-848

Denise Smith
Appellant / Petitioner(s),

v.

Tallahassee Democrat And Bill Cotterell
Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's Motion for Rehearing, Clarification, and Certification, filed on July 17, 2001, is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

| | |
|---|---|
| Denise Smith | D. Andrew Byrne |
| Ken Abele | Gordon D. Cherr |
| C. Gary Williams | Jerry G. Traynham |
| John S. Derr | Michael J. Glazer |

jm

s/JON S. WHEELER, CLERK

Supreme Court of Florida
Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

THOMAS D. HALL, CLERK
DEBBIE CAUSSEAUX, CHIEF DEPUTY CLERK
PHONE NUMBER (850) 488-0125
www.flcourts.org/clerk.html

ACKNOWLEDGMENT OF NEW CASE
October 22, 2001

RE: DENISE SMITH
vs. TALLAHASSEE DEMOCRAT, ET AL.
CASE NUMBER: SC01-2223
Lower Tribunal Case Number : 1D00-3928
Lower Tribunal Filing Date: 10/5/01

The Florida Supreme Court has received the following documents reflecting a filing date of 10/5/2001.

Notice to Invoke Discretionary Jurisdiction Petitioner's Brief on Jurisdiction with appendix (filed 10/15/2001) (Original & 5 copies)

Filing Fee: Paid in Full
Receipt Number: R2001-995290

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Please review and comply with any handouts, if any, enclosed with this acknowledgment.

bhp
cc: HON. JON S. WHEELER, CLERK
DENISE SMITH
BILL COTTERELL
C. GARY WILLIAMS
D. ANDREW BYRNE
BRIAN C. KERI
JOHN S. DERR
JERRY G. TRAYNHAM

Supreme Court of Florida
Monday, October 22, 2001

CASE NO.: SC01-2223
Lower Tribunal No.: 1D00-3928

DENISE SMITH, Petitioner(s)
vs.
TALLAHASSEE DEMOCRAT, ET AL, Respondent(s)

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. See Jenkins v. State. 385 So. 2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
Test:

s/Thomas D. Hall
Clerk, Supreme Court

bhp
Served:
HON. JON S. WHEELER, CLERK
HON. BOB INZER, CLERK
HON. NIKKI ANN CLARK, JUDGE
DENISE SMITH
BILL COTTERELL
C. GARY WILLIAMS
D. ANDREW BYRNE
BRIAN C. KERI
JOHN S. DERR
JERRY G. TRAYNHAM

IN THE CIRCUIT COURT
FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 00-848

DENISE SMITH,

Plaintiff,

v.

LAWRENCE F. KRANERT, the STATE OF FLORIDA, EXECUTIVE OFFICE OF THE GOVERNOR, GOVERNOR BUSH, only in his official capacity, WENDY SEARCY, JERRY G. TRAYNHAM, PATTERSON AND TRAYNHAM, TALLAHASSEE DEMOCRAT, BILL COTTERELL, CERTAIN UNKNOWN DEFENDANTS, whose identities, role, and liabilities are at the present time unknown to the plaintiff but who will be identified by amendment when ascertained,

Defendants.

_____/

ORDER

This Cause came before the Court on June 11, 2001, upon Defendant Wendy Searcy's Motion to Dismiss, Plaintiffs Request for Judicial Intervention, Request for Stay of the Proceedings, and Request to Strike Defendant Kranert's Amended Motion to Dismiss. The Court, having reviewed the Plaintiff s complaint, the parties' motions and memoranda, and having heard the arguments of the parties, and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED:

1. Plaintiff s Request for Judicial Intervention and Motion to Strike Defendant Kranert's Amended

Motion to Dismiss are DENIED based upon Plaintiffs failure to provide any basis for the request and motion.

2. Plaintiffs Request for Stay of the Proceedings is DENIED as moot based upon Plaintiffs withdrawal of this request at the June 11, 2001, hearing.

3. Defendant Searcy's Motion to Dismiss is GRANTED WITH PREJUDICE. The Court finds that the May 5,1998, letter attached to the Plaintiff s complaint as Exhibit "A" involved an employee grievance, and therefore, all statements contained in the letter are subject to an absolute privilege. Hope v. National Alliance of Postal and Federal Employees. Jacksonville Local No. 320, 649 So.2d 897 (Fla. 1st DCA 1995). Accordingly, Defendant Searcy is due to be and is hereby dismissed with prejudice, and Defendant Searcy shall go hence without day.

DONE and ORDERED in Chambers this 25 day of June, 2001.

s/NIKKI CLARK
Circuit Court Judge

cc: John S. Derr, Esq.
Denise Smith
D. Andrew Byme, Esq.
Brian C. Keri, Esq.
Jerry G. Traynham, Esq.
C. Gary Williams, Esq.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

January 4, 2002

Ms. Denise Smith
198 Cairo Road
Bainbridge, GA 31717

Re: Denise Smith
v. Tallahassee Democrat, et al.
Application No. 01A474

Dear Ms. Smith:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy who on January 4, 2002, extended the time to and including February 16, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk
By
s/Sandra Elliott Spagnolo
Assistant Clerk

Local & State
www.tallahassee.com
MONDAY, AUGUST 31,1998

# NOTEBOOK

## By whatever job title he has now, he is in trouble

A lot of people in state government feel overqualified, and state employees often say they've been shelved in a dead-end job for speaking out against managers who want them to quit.

Then there's Larry Kranert, the lawyer, the stock boy and typist. Larry Kranert, the fired guy now suing the Department of Children and Families.

Even in the stilted language of the law, his experience reads like a Gothic horror story.

### Riding the job-go-round

Kranert was hired in 1992 as the chief lawyer for Florida State Hospital, in the old Department of Health and Rehabilitative Services.

Shortly after former HRS Secretary Bob Williams took over as administrator of the hospital, Kranert was demoted to assistant counsel — he said, "without notice or explanation." Last year, he was told that his Selected Exempt Service legal job was being deleted in a belt-tightening move.

Last September, he moved to a job as an accountant — he has a degree in accounting, too — with an understanding that his salary would stay $2,027 biweekly for five years.

The Accountant IV job was in Career Service, and the move was made without advertising the position. But DCF assured him that was all right.

He cleared his six-month probation period in April.

In May, he filed a grievance over what he considered improper practices in the finance office. Soon after the governor's office inquired about his

complaint, Kranert was told that he had created "problems in the workplace," so it would be better if he worked at "an un-air-conditioned storehouse" at the Materials Management Division of Florida State Hospital.

There, the man with degrees in law and accounting counted linens, paint cans and bed pans. His lawsuit also says "he has labored as a clerk, stock boy and, typist."

Fired without any warning

- On June 15, Kranert was notified that his salary was being cut to $1,681 biweekly (still pretty high for an inventory clerk). He was given until Aug. 1 to find another job.

That's because — surprise! - DCF and the Department of Management Services have determined that his Career Service hiring was improper, since the accounting vacancy hadn't been advertised, etc.

Well, says Kranert, that's what he tried to tell them when they moved him. He says DCF assured him it was all "permissible and within agency rules."

Williams declined comment, saying "it's not appropriate to try litigation in the paper." But he did say "there's not one scintilla of truth about any retaliation" against Kranert for his complaint about financial practices at Florida State Hospital.

But even with the most innocent of motives, there's a warning here for other Senior Management and Selected Exempt Service employees.

They can be fired without warning, reason or recourse — which is why some are looking for shelter in Career Service before a new administration takes over. Those who transfer downward ought to know that, if management messed up the paperwork, they're the ones who'll suffer for it.

Denise Smith
198 Cairo Road
Bainbridge GA 31717

September 14, 1998

J. Michael Pate, President
Bill Cotterell
Knight Ridder Newspapers
Tallahassee Democrat
277 N. Magnolia Drive
Tallahassee Fl 32302

Dear Sirs:

I ask that you not publish this letter; it is meant for your information only.

A column appeared in your August 31, 1998 paper concerning alleged improprieties at Florida State Hospital. Let me first state that I agree 100% with Mr. Williams that the issues should not be tried in the press. However, I feel I must comment on your method of reporting the matter. Your article gave the impression that 'financial improprieties' were part of this matter. As you must surely know, that is not the case, has not been the case, nor was that charge ever made in either the grievance or the lawsuit you mention. Also, it appears that you are not troubled by misquotes, or the problems those misquotes could cause for innocent people.

I believe a "free press" is an essential ingredient of a free and democratic society. However, I also believe that that press has an obligation to ensure that its reporting is honest, accurate and ethical, and if it is not, that "free press" becomes a detriment to the society it purports to serve. And though the participants in this matter choose not to comment on

pending litigation, that does not relieve anyone reporting on it of their responsibility to accurately present the matter using the information already at their disposal. You did not do that.

I am not the reporter, Mr. Cotterell, you are. But let me respectfully suggest to you how I would have handled this matter if I were the reporter and you were the unfortunate person being sued.

First, I would have read the lawsuit I was commenting on - and quoting from. And if I didn't have a copy, I would have demanded one before I proceeded making blind statements which could hurt innocent people. Next, I surely would have noticed that the "Grievance" I was planning to mention in my column, was referred to and attached as an "exhibit" to that lawsuit. I would certainly have read that grievance. And, I am sure that the extreme wording of that "Grievance" would have given me pause and reason to question the events as told to me. I would have wondered why and how the "governor's office" had gotten hold of what was purported to be a "union grievance". I would have asked the person, whose intention it was to have a column written about the matter, if there was a reply to that "Grievance", and could I please have a copy. I would certainly have noticed that the lawsuit referred to a reply being given to that grievance, and if I did not receive one from the person requesting the article, I would have contacted the organization to which the "Grievance" was addressed to inquire whether they had received a reply, and could I please have a copy. I certainly would not have gone any further with the column without receiving and reading the reply to that "Grievance" – a grievance you admitted you knew existed and to which there was evidence in the lawsuit that a reply had been given. I would have asked the person filing that Grievance whether there were any

"other" documents related in any way to this matter, and could I please have a copy of all, along with any and all replies. I would have made it very clear to this individual that, if any information were withheld from me, I would reveal that fact in a later column, and I would point out to this person that my writings concerning any withheld information would not reflect favorably upon him/her.

Finally, prior to putting it out to the public, I would certainly have confirmed "quotes" before putting quotation marks around a statement I was attributing to someone. Your inaccurate quote painted very respectable, caring people as irresponsible ogres.

But the real tragedy in the reporting of this matter, is that if you had only done the "first" thing I suggested - reading the "lawsuit" you were commenting on and quoting from - the rest would have followed naturally, perhaps changing the entire complexion of the column you wrote. But then, I am not the reporter, Mr. Cotterell, you are.

Unfortunately, your inaccurate and misleading column did a disservice to a wonderful hospital; it did a disservice to the employees of that hospital who truly care about our patients and their care; it did a disservice to the community of which that hospital is a significant part; it did a disservice to your readers by misleading them into believing other than what the issues are; and it did a disservice to all of the people who are negatively affected by the untruthful and misleading statements made in your column.

Do you care?

Yours truly,
s/Denise Smith

cc: Brill's Content

Denise Smith
198 Cairo Road
Bainbridge GA 31717

September 14, 1999

Anthony P. Ridder, CEO
Knight Ridder Newspapers
1 Herald Plaza
Miami FL 33132

Re: Tallahassee Democrat, Mon. August 31, 1998
Section C, Local & State, page 1C
'NOTEBOOK' by Bill Cotterell, State Agencies
Headline: "*By whatever job title he has now, he is in trouble*"

Dear Mr. Ridder,

I am writing regarding the above referenced article. A copy of that article is attached for your convenience. I was Mr. Kranert's supervisor. I have previously written to you about this article but no corrections or retractions were made.

The article contained a number of errors and suppositions, and the article conveys to your readers other than what the matter was about. Among those are:

a) Your article gave the appearance that the grievance and the lawsuit you wrote about were about financial matters. They were not.

b) You stated that Larry Kranert has "a degree in accounting". He does not.

c) You misquoted when you wrote ..."an un-air-condition storehouse".

If you do not print an appropriate and acceptable correction and/or retraction, I will seek an attorney to take legal action against you.

Your attention to this matter is requested and will be deeply appreciated.

Yours truly,
s/Denise Smith

Attachment

Denise Smith
198 Cairo Road
Bainbridge, GA31717
October 19, 1999

SENT VIA FAX on 10/19/99 to (850)599-2295 and
REGULAR MAIL on 10/20/99
Robert Shaw, Managing Editor
Tallahassee Democrat
277 N. Magnolia Drive
Tallahassee, FL 32302

Re: Tallahassee Democrat, Mon. August 31, 1998
Section C, Local & State, page 1C
'NOTEBOOK' by Bill Cotterell, State Agencies
Headline: "*By whatever job title he has now, he is in trouble*

Dear Mr. Shaw,

Per our telephone conversation of this evening, I am deeply disturbed about your introduction of matters that were never a part of Bill Cotterell's 8/31/98 article referenced above, or the lawsuit or grievance he referred to in that article.

I take your reference to those unrelated matters as a threat of retaliation against me in response to my demands for a correction and/or retraction as specified in my September 14, 1999 letters to Mr. Ridder, Mr. Pate and Mr. Cotterell. I hope that the Tallahassee Democrat would not proceed in such a malicious manner.

Very truly yours,
s/Denise Smith

TALLAHASSEE DEMOCRAT
FLORIDA'S CAPITAL NEWSPAPER
P.O. Box 990 • 277 N. Magnolia Dr. •
Tallahassee. FL 32302-0990 • (904) 599-2177 • FAX
(904) 599-2295

Robert D. Shaw. Jr.
Managing Editor

October 20. 1999

Ms. Denise Smith
198 Cairo Road
Bainbridge, Georgia 31717

Dear Ms. Smith:

I am in receipt of your faxed letter regarding our telephone conversation of October 19. This is to state emphatically and for the record that my call was in no way intended as "a threat or retaliation;" that to my knowledge I introduced nothing in our conversation that was not a part of or referred to in Bill Cotterell's column of 8/31/98; and that I remain frustrated by your refusal to be explicit about your objections to the content of that column.

My notes and recollection of our conversation indicate that I repeatedly asked you to amplify on your complaints as expressed in your letters of Sept. 14, 1998 and Sept. 14, 1999. That latter letter listed three "errors:" a statement that Larry Kranert has a degree in accounting, when he does not; a "misquote" in Mr. Cotterell's reference to Mr. Kranert claiming he had to work in an "un-air-conditioned warehouse;" and a very broad allegation that the column "gave the appearance that the grievance and the lawsuit you wrote about were about financial matters. They were not." My notes reflect that you refused to elaborate on any of these

points, repeatedly telling me that "I really can't go any further" and that "you have the resources to check these out."

I told you that I had checked them. I said Mr. Cotterell acknowledged that he was mistaken when he said Mr. Kranert has a degree in accounting - though he has in fact taken enough accounting courses to qualify for a state position as an accountant. I said I had no way of knowing whether Mr. Kranert was correct in describing the warehouse as not being air conditioned but that we had accurately quoted that description from his lawsuit. As to your third point, I said that my understanding of the grievance was that it concerned a vendor doing business with the hospital who was providing purchasing officials with hockey tickets and other alleged perks, which Mr. Kranert objected to. I explained that the column's very broad description of that grievance - that it concerned "what he considered improper practices in the finance office" - seemed to me to be accurate, absent additional information from you explaining why it was not. I asked you several times to provide that information. Each time, you refused.

At one point, you told me you were considering talking to a lawyer. I told you that my understanding of the law is that to have grounds for a lawsuit, you must first tell us specifically what is wrong with the story and demand a retraction. I told you that, in my judgment, you hadn't done that. "There is nothing further I can give you," you declared.

As a result, I felt you left me no choice but to terminate our conversation. I'm unable to suggest what a correction of the article might say because I still don't know how it was wrong, if it was. Your point about Mr. Kranert not having a degree in accounting is accurate, but that's an extremely minor mistake that -

13 months later - doesn't warrant a correction. Should we write about his case in the future, however, we will make clear that Mr. Kranert qualifies for an accounting position but does not have a degree. The other "errors" you cite appear to me, in the absence of evidence to the contrary, to be matters of opinion and/or judgment. In each case, Mr. Cotterell's statements appear to be a fair representation of the facts.

As I told you last night, I remain open to further information from you about what might be wrong with this column, if anything. Until and unless you provide that information, I have no intention of responding further to you.

Very truly yours,
s/Robert D. Shaw Jr.
Managing Editor

cc: J. Michael Pate, publisher
P. Anthony Ridder, Knight Ridder
Bill Cotterell

Subject: Financial Services survey
Author: "Bill Cotterell" <bcotterell@taldem.com>
at DCF
Date: 9/1/00 1:52 PM

Hi, Ms. Alcorn

I've been told that an employee survey was recently conducted in the FSH office of financial services, regarding allegations of mismanagement, morale problems or other irregularities. It is my understanding that the director of the office is on annual leave, but that the survey responses have been collected from employees.

As these are public record, I have asked that individual employees forward copies of their responses to me. Of course, I would like to see the entire package, and therefore would appreciate any comment your office may wish to make on the situation. When would it be convenient for you, if I was to drive over next week (after the primary election, of course!) to discuss the employee responses?

Thanks,
Bill Cotterell
Tallahassee Democrat

Author: Sandy Koon
Date: 9/13/00 5:35 PM

To: Celeste Sanders D02 DCF @ DCF
cc: John Awad D02 DCF @ DCF
Diane James D02 DCF @ DCF

Subject: Press Issue

Faye Alcorn, Assistant Hospital Administrator received an e-mail from Bill Cotterrel of the Tallahassee Democrat inquiring about a personnel issue in the Financial Management area. Faye referred the inquiry to Diane James. Diane contacted Bill today and acknowledged that we did receive the e-mail and informed him the agency was reviewing the issue, however, at this time she could not comment further until she had reviewed the matter and was presented with the facts. Bill responded that he was not real sure that Faye had received the e mail since his computer crashed soon after sending the message and that he was just curious. He further stated that this was not a hot topic and he had really just placed it on the "back burner". For your information: Diane has asked several members of the District staff to conduct an management review of the financial department at FSH. Diane followed up with Bill to let him know that we could not comment at this time. I do not expect this to become a story, however, you are in the loop and have the most current facts.

Subject: Financial Services survey
Author: Faye Alcorn at FSHHB295
Date: 9/7/00 1:28 PM

Denise:
I have received this request. Diane asked that I not respond at this time and forward the message to her, which I have done. There will be no contact until further direction is received from her. This is for your information only.

When you return from vacation, we need to sit down and discuss the whole issue of the survey.

Thanks!
Faye

Author: Faye Alcorn/D02/DCF at DCF
Date: 9/15/00 10:31 AM
Priority: Normal
TO: Denise Smith at FSHHB295
Subject: Press Issue

Subject:
Press Issue

Denise:

FYI and per our discussion. No further contact Should be made with Bill C., as he did not appear to want to write a story on the issue and was satisfied with the contact from Diane This is being forwarded to you simply to keep you notified of what is occurring, per your request.

Call me if you have any questions.

Faye

Author: Denise Smith
Date: 9/18/00 07:25 AM
TO: Faye Alcorn/D02/DCF
cc: Diane James/D02/DCF
MaryEllen McDonald
Subject: Financial Services survey

Faye,

I am inquiring into when will DCF comply with Mr. Cotterrell's 9/1 public records request (below) for a copy of the "ENTIRE PACKAGE" of the "THE EMPLOYEE SURVEY RECENTLY CONDUCTED IN THE FSH OFFICE OF FINANCIAL SERVICES" on August 28th & 29th, 2000. Please advise.

As you know, immediately upon collection of the surveys, I left for a scheduled vacation on August 29th. Upon my return from vacation, on 9/12 I provided Administration with a full copy of the record, which included: 1) the anonymous letter of complaint requesting a survey, 2) my 8/23 memo concerning the survey, 3) the survey guidelines, and 4) copies of all of the employees' surveys which were attached to my response addressing the concerns contained in the surveys submitted by staff. My 8/23 memo to my staff included directions on how they could describe allegations of retaliation and still maintain their anonymity. If the staff responses proved anything, they certainly proved that staff were confident in their anonymity and fearless in speaking their minds in that survey.

It is clear from Mr. Cotterell's stated understanding of the reason for the survey - - "ALLEGATIONS OF MISMANAGEMENT, MORALE PROBLEMS OR OTHER IRREGULARITIES" - - that he was notified of the survey by a person biased against me. Within 2 days of the survey being completed, Mr. Cotterell made contact with Wendy Searcy for a copy of her survey response. Although I

am not suggesting that she is the person who notified Mr. Cotterell of the survey, Mr. Cotterell by-passed all supervisory and management personnel including the Administrative Secretary in his contact and directly contacted a person in an entry level position, Wendy Searcy, whom Mr. Cotterell surely expected would have a bias against me. The withholding of any part of the complete record on the matter as detailed above will not be in my best interest - nor, do I think, in the best interest of my employer - as it will reinforce the untruthful and negative information Mr. Cotterell has been receiving about me and employee working conditions in Financial Services.

Faye, when we last spoke you weren't aware of Mr. Cotterell's public records request having been filled. I fear that any delay or secrecy whatsoever surrounding the release of the entire record detailed above will give the appearance of impropriety and cover-up. The staff have spoken. As to the negative surveys, I believe I can evidence fully that this is a hold over of the problems Lawrence Kranert created for me, Financial Services, and FSH after his attorney position was deleted and he was transferred into my department. As far as the number and depth of compliments of me and the department, I suggest it is rare indeed that a supervisor receives the depth of praise from her staff that I did in an "anonymous" survey. I am attaching a copy of a ccmail I received from one of the long time employees of Financial Services. I have received similar comments verbally from other staff.

I am concerned that non-compliance with Mr. Cotterell"s request will give the appearance of impropriety on my part, please advise on how DCF is going to proceed in this matter.

Thanks,
Denise

| | |
|---|---|
| Author: | Faye Alcorn/D02/DCF at DCF |
| Date: | 9/21/00 6:20 PM |
| Priority: | Normal |
| TO: | Denise Smith at FSHHB295 |
| cc: | Diane James/D02/DCF at DCF, MaryEllen McDonald/D02/DCF at DCF |
| Subject: | Re: Financial Services survey |

Denise:

Diane took care of this request in the manner she deemed appropriate.

Faye

DATE: Septembe 12, 2000
TO: Financia. Services Staff
FROM: Denise Smith

**Has Bill Cotterell of the Tallahassee Democrat requested that you send a copy of your survey response to him?**

| | | |
|---|---|---|
| 1. Baker, Raymond | No | s/ Ray Baker |
| 2. Bentley, Betty | No | s/ Betty Bentley |
| 3. Bowen, Nicole | No | s/ N Bowen |
| 4. Burns, Susan | No | s/ S Burns |
| 5. Corbett, Jill | No | s/ Jill Corbett |
| 6. Dean, Roser | No | s/ Roser Lee Dean |
| 7. Duncan, JoAnne | No | s/ JoAnne Duncan |
| 8. Ethridge, Wynelle | No | s/ Wynelle Ethridge |
| 9. Hindman, Yvonne | No | s/ Yvonne Hindman |
| 10. Jackson, Myrtle | No | s/ Myrtle Jackson |
| 11. Kelton, Janice | No | s/ Janice Kelton |
| 12. Lawrence, Linda | No | s/ Linda Lawrence |
| 13. Lawrence, Tanya | No | s/ Tanya Lawrence |
| 14. McDaniel, Deidra | No | s/ Deidra McDaniel |
| 15. Mercer, Jessica | No | s/ Jessica Mercer |
| 16. Mercer, Sheila | No | s/ Sheila Mercer |
| 17. Pollock, Shelia | No | s/ Shelia Pollock |
| 18. Riley, Nellie | No | s/ Nellie Riley |
| **19. Searcy, Wendy** | **Yes** | **s/ Wendy Searcy** |
| 20. Thomason, Kathy | No | s/ Kathy Thomason |

Supreme Court, U.S.
FILED
MAR 26 2002
CLERK

No. 01-1222

IN THE

# Supreme Court of the United States

DENISE SMITH,

*Petitioner,*

*v.*

TALLAHASSEE DEMOCRAT and BILL COTTERELL,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA**

## BRIEF IN OPPOSITION

JOHN R. BERANEK
*Counsel of Record*
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## STATEMENT OF THE CASE AND FACTS

Petitioner, Denise Smith ("Smith") through her Petition for Writ of Certiorari seeks review of an order dismissing with prejudice a complaint (the "Complaint") filed by her in Leon County, Florida. Specifically, the Order at issue (A1),[1] dismissed all of the counts of Smith's Complaint against the Respondents, Tallahassee Democrat and Bill Cotterell (hereafter collectively, the "Democrat") with prejudice. The Democrat affirmatively disputes Smith's inaccurate statement of the operative facts. The correct operative facts are as follows:

On April 13, 2000, Smith filed a five-count complaint against numerous individuals and entities. These Defendants, included the State of Florida, the Honorable Jeb Bush as Governor of the State of Florida, the Tallahassee Democrat and one of its reporters, Bill Cotterell, among others. Smith's Complaint was approximately twenty eight pages single spaced, and totaled almost one-hundred and thirty pages with its exhibits.

Smith's Complaint against some of the other Defendants is still pending in the trial court, though at least one other Defendant, Wendy Searcy, has also been dismissed. Smith has appealed dismissal of Wendy Search to the First District Court of Appeal for the State of Florida. Thus, Smith's Complaint remains pending in the trial court against the remaining Defendants.

In her complaint, Smith alleged three counts against the Democrat: Count II "Media Libel", Count III "Conspiracy to

1. The Democrat is not filing supplemental materials. Therefore, citations to the appendix refer to the materials in Smith's Appendix.

Libel", and Count V "Harassment and Intentional Causing of Emotional Distress." The sole basis for Smith's Complaint against the Democrat is a column published by the Democrat on August 31, 1998 (A7-the Column).

Accepting the allegations of Smith's Complaint as true, the substance of Smith's Complaint centers on a dispute between Smith and another employee of the Florida State Hospital, Larry Kranert. According to Smith's Complaint, Mr. Kranert filed a grievance concerning Smith's management style shortly after being transferred under Smith's supervision. This grievance appears to have started a war of correspondence between Smith, Kranert, and numerous state officials. On August 31, 1998, Bill Cotterell, a reporter for the Democrat, wrote a column entitled, "By whatever job title he has now, he is in trouble" ("Column"). The Column discussed a lawsuit that Mr. Kranert had filed against the Florida Department of Children and Families and seven state officials, including Smith. This Column forms the sole basis for Smith's Complaint against the Democrat. It is reproduced, in its entirety, as it appeared on August 31, 1998 (over twenty months before the Complaint was filed) immediately following this section. Smith is never mentioned in the Column.

On May 15, 2000, the Democrat filed a Motion to Dismiss Smith's Complaint. On August 9, 2000, the Honorable Nikki Clark, Leon County Circuit Court Judge, heard argument from both Smith and the Democrat on the Democrat's Motion to Dismiss. On September 11, 2000, Judge Clark issued an Order dismissing Smith's Complaint against the Democrat with prejudice (the "Order").

On July 3, 2001, the First District Court of Appeal for the State of Florida Per Curiam affirmed the trial court's decision to dismiss the Complaint against the Democrat with prejudice. The Florida Supreme Court refused to review the First District Court of Appeal's Per Curiam Decision. Thereafter, Smith filed the current Petition for Writ of Certiorari ("Petition") which was docketed with this Court on February 25, 2002.

**TALLAHASSEE DEMOCRAT**
**MONDAY, AUGUST 31, 1998**
**THE COLUMN**

**BY WHATEVER JOB TITLE HE HAS NOW, HE IS IN TROUBLE**

A lot of people in state government feel overqualified, and state employees often say they've been shelved in a dead-end job for speaking out against managers who want them to quit.

Then there's Larry Kranert, the lawyer, the accountant. Larry Kranert, the stock boy and typist. Larry Kranert, the fired guy now suing the Department of Children and Families.

Even in the stilted language of the law, his experience reads like a Gothic horror story.

**Riding the job-go-round**

Kranert was hired in 1992 as the chief lawyer for Florida State Hospital, in the old Department of Health and Rehabilitative Services.

Shortly after former HRS Secretary Bob Williams took over as administrator of the hospital, Kranert was demoted to assistant counsel – he said, "without notice or explanation." Last year, he was told that his Selected Exempt Service legal job was being deleted in a belt-tightening move.

Last September, he moved to a job as an accountant – he has a degree in accounting too – with an understanding this his salary would stay $2,027 bi-weekly for five years.

The Accountant IV job was in Career Service, and the move was made without advertising the position. But DCF assured him that was all right.

He cleared his six-month probation period in April.

In May, he filed a grievance over what he considered improper practices in the finance office. Soon after the governor's office inquired about his complaint, Kranert was told that he had created "problems in the workplace," so it would be better if he worked at "an un-air-conditioned storehouse" at the Materials Management Division of Florida State Hospital.

There, the man with degrees in law and accounting counted linens, paint cans and bed pans. His lawsuit also says "he has labored as a clerk, stock boy and typist."

**Fired without any warning**

On June 15, Kranert was notified that his salary was being cut to $1,681 biweekly (still pretty high for an inventory clerk). He was given until Aug. 1 to find another job.

That's because – surprise! – DCF and the Department of Management Services have determined that his Career Services hiring was improper, since the accounting vacancy hadn't been advertised, etc.

Well, says Kranert, that's what he tried to tell them when they moved him. He says DCF assured him it was all "permissible and within agency rules."

Williams declined comment, saying "it's not appropriate to try litigation in the paper." But he did say "there's not one scintilla of truth about any retaliation" against Kranert for his complaint about financial practices at Florida State Hospital.

But even with the most innocent of motives, there's a warning here for other Senior Management and Select Exempt Service employees.

They can be fired without warning, reason or recourse – which is why some are looking for shelter in Career Services before a new administration takes over. Those who transfer downward ought to know that, if management messed up the paperwork, they're the ones who'll suffer for it.

## SUMMARY OF THE ARGUMENT

This Court should deny Smith's Petition. Smith's Complaint was correctly dismissed by the Florida trial court and full appellate review has occurred in the First District Court of Appeal and the Supreme Court of Florida. This pro se litigant and her meritless claims have had their day in court. Smith has dragged the Democrat through the entire judicial system of Florida, forcing it to expend time

and resources defending itself against her frivolous claims. The courts of Florida decided the issues correctly based upon both Federal and State law. The decision Smith complains about has independent state grounds to support it. Consequently, this Court should decline to invoke its jurisdiction in this matter.

Additionally, the case does not involve unsettled matters of law, nor does it involve matters of great injustice. Instead, this case evidences the abuse of the judicial system by an overzealous pro se litigant. Smith has made the Democrat a hostage in her own personal vendetta against another Defendant, Mr. Kranert. In short, Smith's frivolous claims are unworthy of this Court's attention.

In recognition of the importance of freedom of the press and the chilling effect libel actions have on the press, the well established case law in Florida clearly mandates pretrial disposition of meritless libel actions. As Smith's Complaint against the Democrat was completely devoid of merit, the trial court properly dismissed Smith Complaint against the Democrat with prejudice.

The trial court stated four independent reasons for dismissing Count II of Smith's Complaint (Media Libel). (A1-Order at issue) All four of the reasons relied upon by the trial court were correct. First and foremost, the trial court correctly held the Column did not libel Smith. The Column was not false, nor did it damage Smith's reputation. Any reasonable reading of the Column leads one to this inescapable conclusion.

Second, the trial court correctly concluded that the Column was not of and concerning Smith. Therefore, the

Column could not form the basis of a libel action by Smith. The Column discusses the Florida State Hospital, identifying and quoting its administrator Bob Williams. The Column does not mention Smith by name or title. Libel is a personal action. Smith may not maintain a libel action for statements regarding the Florida State Hospital generally.

Third, the trial court correctly held that accepting the allegations of Smith's Complaint as true, Smith is a public official. As a public official, Smith must prove actual malice on the part of the Democrat by clear and convincing evidence. Actual malice is defined as publication of a false statement with knowledge of its falsity, or with reckless disregard for its falsity. As the Column is a substantially accurate report of a lawsuit filed against the State of Florida, the trial court correctly held that Smith could not clearly and convincingly prove actual malice and properly dismissed the Complaint. Finally, the trial court found the Fair Reporting Privilege to be applicable. Florida law recognizes the Fair Reporting Privilege, which protects substantially accurate reports of official judicial proceedings. The Column expressly states that it is based upon a lawsuit filed against the State of Florida, and accurately reports the allegations of the lawsuit. Consequently, it is protected speech and cannot form the basis of a libel action by Smith against the Democrat.

Smith's remaining counts were also properly dismissed. Smith cannot state a cause of action for conspiracy to libel when there has been no libel. Under Florida law, Smith also may not transform a libel action into an intentional infliction of emotional distress action absent an independent tort. There was no independent tort. Therefore, the intentional infliction of emotional distress count was also properly dismissed. In conclusion, the trial court properly decided this case.

## ARGUMENT

### I. SMITH'S PETITION SHOULD BE DENIED.

Smith asks this Court to review a Florida trial court's decision. While Smith attempts to argue Federal questions are involved and thereby this Court's jurisdiction is justified, a review of the Order in question reveals otherwise. As stated previously, the Order listed four independent reasons for dismissing Smith's libel claim. Three of those four reasons for the trial court's decision were based upon independent state grounds, including the primary and most important reason – the article did not libel Smith as a matter of law.[2] As the trial court's decision has independent state grounds, this Court should deny Smith's Petition.

#### A. Independent State Grounds.

This Court has addressed its own jurisdiction to review state court decisions when the decision rests on independent state grounds on numerous occasions. *See Enterprises Irrigation District v. Farmer Mutual Canal Company*, 243 U.S. 157, 164 (1917) (numerous citations within); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (numerous citations within). In each of these cases, this Court has found that it lacked jurisdiction to review the state court decision.

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2. The one ground cited by the trial court which may arguably involve questions of Federal law: the applicability of the actual malice standard established in *New York Times v. Sullivan*, 376 U.S. 254, 279-81 (1969), has been sufficiently discussed by this Court in other opinions. *See Masson v. New York Magazine*, 501 U.S. 496 (1991); *Harte-Hanks Communications, Inc.*, 491 U.S. 657 (1989); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Herbert v. Lando*, 441 U.S. 153 (1979). Thus, this issue does not warrant granting Smith's Petition.

In the present case, the trial court found that the Column did not libel Smith as a matter of Florida law. This Court should not review this decision, as it was properly based upon Florida law. Additionally, the trial court's determination that the Column was not "of and concerning" Smith was based upon state court decisions applying the Florida standard. Finally, the trial court found that the Column was protected by a privilege recognized by Florida law, the Fair Reporting Privilege. Again, this Court should not review this decision, as it is a matter of state law. Therefore, the trial court's decision had multiple independent state grounds, which should preclude further review by this Court.

**B. Problems within Petition.**

Smith's Petition is defective on several grounds. First, Smith fails to provide this Court with the key documents necessary for it to decide whether to grant certiorari. However, Smith does include in her Appendix and Petition materials and information from outside the record, which should not properly be considered by this Court. Finally, Smith misstates both the facts and the law of this case.

Initially, Smith has filed to provide this Court with the key documents necessary to review this action. Without Smith's Complaint, the Democrat's Motion to Dismiss, and Smith's response, this Court cannot adequately evaluate this case. If the proper documents had been provided, this Court could better appreciate the lack of merit and the absurdity of Smith's claims against the Democrat. Absent these key documents, this Court should still have no problem recognizing that the trial court was correct; but it may not be able to fully appreciate the zeal with which she has pursued these meritless claims against the Democrat.

In her Petition, Smith has spent considerable time making new allegations against the Democrat concerning conduct that occurred subsequent to the filing of her Complaint and even subsequent to the trial court's Order. Examples can be found in paragraphs 16, 44, 48, and 65 of Smith's Petition but references are sprinkled throughout. Furthermore, Smith has attached several items to her Appendix that were *not* part of the record with the trial court. Smith's Petition, Apps. A12-A18. These items should be disregarded by this Court.

Florida law prohibits an appellate court from considering evidence or allegations that were not presented to the lower tribunal. *See Hillsborough County Board of County Commissioners v. Public Employees Relations Commission*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982); *Seashole v. F & H of Jacksonville, Inc.*, 258 So. 2d 316, 317 (Fla. 1st DCA 1972). "It is axiomatic that appellate review is confined to the record on appeal. . . . It is inappropriate and will subject movant to sanctions to inject matters into the appellate proceedings which were not before the trial court." *Thorner v. City of Fort Walton Beach*, 534 So. 2d 754, 755 (Fla. 1st DCA 1988). Additionally, this Court's review is limited to the record presented below. *See Witters v. Washington Dept. of Services for Blind*, 474 U.S. 481, 486 n.3 (1986).[3]

The Democrat hereby respectfully requests that this Court disregard Smith's improper new arguments and allegations.

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3. In the same vein, the Democrat will not respond to Smith's assertions of inability to obtain counsel, and trust this Court will recognize that any difficulty Smith may have encountered locating counsel is more a reflection of the complete lack of merit of her case than any conspiracy among attorneys in Florida.

The Democrat relies upon the cited case law and the unquestionable principle of law that issues can not be raised for the first time on appeal. Clearly, allegations regarding subsequent conduct or events are not properly before this Court and should be disregarded.

In paragraph 60 of her Petition, Smith states that Court decided all issues of fact. This is not correct. The trial court properly applied the correct legal standard on a motion to dismiss and accepted all of Smith's allegations as true. Even accepting her allegations as true, the trial court concluded that Smith could not state a cause of action for libel against the Democrat based upon the Column. Throughout her Petition, Smith asserts the Column contained numerous false statements. *See* Paragraph 25 of Petition. However, there is only a single inaccurate statement – the Column stated Mr. Kranert had a degree in accounting and he does not. Clearly, this minor inaccuracy did not concern or libel Smith. Even assuming the other items cited by Smith were false (they were not), Smith was still not libeled by the Column. These are representative examples of Smith's habit of misstating both the facts and the law.

## II. THE COLUMN DID NOT LIBEL SMITH.

The Order dismissing Smith's Complaint stated four independent reasons for dismissing Count II ("Media Libel"): 1) the Column did not libel Smith; 2) the Column was not "of and concerning" Smith; 3) as a public official Smith would be required to prove actual malice, which she can not do; and 4) the Column is protected by the Fair Reporting Privilege. (A1) Count III ("Conspiracy to Libel") was dismissed by the trial court on the basis that there can be no conspiracy to libel when there has been no libel. Finally,

Count V ("Harassment and Intentional Causing of Emotional Distress") was dismissed on the basis that an action grounded in libel may not be transformed into an action for intentional infliction of emotional distress absent an independent tort; and there was no independent tort in this action.

**A. The Column is Not Libelous.**

The threshold question addressed by the trial court was whether the complained of statements in the Column were libelous. Florida law provides that libel is a false written statement that injures the reputation of another. *See Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 804 (Fla. 1st DCA 1997). The initial determination of whether a particular statement is libelous is a question of law for the court to decide. *See Ross v. Gore*, 48 So. 2d 412, 416 (Fla. 1950) ("When the statement alleged to be libelous could not properly leave the impression charged in the innuendo, there is no issue for the jury."). The court should consider the alleged libelous statement as the common mind would understand it, not by the extremes. *See Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983). With all due respect to Smith, a review of her Complaint and the arguments made in her Petition reveal that she routinely argues extreme and unreasonable interpretations of the facts and the law.

The Column at issue was not false, as it accurately reported the allegations of the lawsuit filed by Kranert (a copy of which was attached to Smith's Complaint as Exhibit Y). In addition, the Column does not damage Smith's reputation. Smith is never mentioned by name, or title. Smith is not accused of any wrong doing, nor is she implicated in any improper activity. The Column is simply not about Smith.

Despite Smith's hyper-imaginative interpretations to the contrary, the story simply does not concern her, and consequently could not have damaged her reputation. No reasonable reader could conclude that the story defamed Smith. As the trial court properly decided that the alleged communication could not possibly have a defamatory or harmful effect, the court properly disposed of the claim through dismissal. *See Byrd v. Hustler Magazine, Inc.*, 433 So. 2d at 595.

**B. The Column is not "of and concerning" Smith.**

Libel is a personal action. It is fundamental that in order to recover in a libel action the plaintiff must show that the statements are of and concerning her. *See Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800 at 805 (affirming dismissal with prejudice on this basis). Allegations of libel by an organization and its members are not interchangeable; statements that refer to an organization do not implicate its members or officers. *See McIver v. Tallahassee Democrat, Inc.*, 489 So. 2d 793, 794 (Fla. 1st DCA 1986) (statement that company's president testified before grand jury involving bribery could not support libel action by company as a matter of law.) To allow a government official to bring a libel action based upon statements concerning their particular governmental entity would "invite the specter of prosecutions for libel on the government, which the Constitution does not tolerate in any form." *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966).

The Column that was the subject of the action below clearly did not meet the required element in Florida law that the allegedly libelous statements be "of and concerning" Smith. Smith was never mentioned in the Column by name

or title. In fact the Column names only one individual other than Kranert, the hospital administrator, Bob Williams. The gist and tenor of the Column is directed toward the Florida Department of Children and Families (the "DCF") as an entity, not any one individual.[4] A generic reference to "managers" does not justify the conclusion that the Column is about Smith. In her Petition (pg. 23), Smith attempts to insert her name in numerous places in the Column. The fact is that her name does not appear anywhere. Her insertions are again an exaggerated attempt to create references to herself where none reasonably could be construed to exist. As the Column is directed at DCF and the Florida State Hospital, the trial court correctly ruled that Smith cannot state a claim for libel against the Democrat.

### C. The Column concerns public officials and is therefore protected speech.

In the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. at 279-81, this Court held that a public official may not recover damages for defamatory statements unless she can prove the statements were made with actual malice. This Court defined actual malice to be publication with knowledge of falsity, or with reckless disregard of whether it was false or not. *See id.* The plaintiff must demonstrate actual malice with clear and convincing evidence. *See id.* at 282; *Cronley v. Pensacola News-Journal, Inc.*, 561 So. 2d 402, 405 (Fla. 1st DCA 1990) (affirming summary judgment against the plaintiff for failure to meet this high burden).

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4. Smith may not prosecute a libel action based upon statements concerning the DCF or the Florida State Hospital. Such an action is constitutionally prohibited. *See Rosenblatt*, 383 U.S. at 81.

Florida law provides that a public official is an individual among the hierarchy of government employees who has, or appears to the public to have, substantial responsibility for or control over the conduct of government affairs. *See Stewart v. Sun Sentinel Co.*, 695 So. 2d at 361. Courts across the country consistently construe the test for public officials broadly encompassing almost every imaginable public employee, and certainly those that have any managerial or supervisory duties. *See Stewart* (finding correction officers to be public officials); *Ferguson v. Union City Daily Messenger, Inc.*, 845 S.W.2d 162, 166-67 (Tenn. 1992) (county employee with title Director of Finance held to be public official); *Moorhead v. Millin*, 542 F. Supp. 614, 618 (D. Virgin Islands 1982) (Director of Division of Utilities and Sanitation held to be public official); *Baumback v. American Broadcasting Cos.*, 26 Med. L. Rptr. 2138, 2139-42 (4th Cir. 1998) (federal bureaucrat with title Timber Sale Contract and Appraisal Specialist held to be public official); *Brown v. Kitterman*, 443 S.W.2d 146, 155 (Mo. 1969) (community center manager is public official); *Kinney v. Bauch*, 596 P.2d 1074, 1079 (Wash. App. Ct. 1979) (city clerk is public official); *Clawson v. Longview Publishing Company*, 589 P.2d 1223 (Wash. 1979) (administrator of county motor pool was a public official).

Smith described herself within the Complaint as a supervisor, the Director of the Finance Office, and the person responsible for the Finance Office. Thus, Smith by her own admission falls within the definition of a public official under Florida law.[5] As a public official, Smith would have to prove

5. It is worth noting that Smith's claim to be a private individual contradicts her claim that people throughout the state government immediately recognized the Column as being about her. Smith cannot have it both ways. She cannot be a lowly state employee on the one hand, and a well known state manager on the other.

actual malice on the part of the Democrat by clear and convincing evidence to prevail on her libel claim. The trial court correctly held that Smith cannot prove that the Democrat published the Column with knowledge of its falsity, or with reckless disregard of whether it was false. As the Column accurately reports the allegations made by Kranert in his lawsuit,[6] the trial court was correct in ruling that Smith cannot prove the Column is false, much less prove that the Democrat published the Column with reckless disregard to whether it was false or not. Smith's inability to ever plead the requisite degree of falsity or publication with reckless disregard of its falsity properly resulted in Smith's Complaint being dismissed with prejudice.[7]

### D. The Column is protected by the Fair Reporting Privilege.

Under Florida law, there is a qualified privilege, the Fair Reporting Privilege, to publish reports concerning judicial proceedings. *See Huszar v. Gross*, 468 So. 2d 512, 516 (Fla. 1st DCA 1985) (affirming dismissal with prejudice on this basis). Courts routinely use motions to dismiss to decide whether this privilege applies to allegedly defamatory statements. *See id.* This privilege requires the report to be

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6. As noted earlier, the complaint in Kranert's lawsuit was one of the numerous attachments to Smith's Complaint. Thus, it was before the trial court when ruling on the Democrat's Motion to Dismiss.

7. Smith complains about the newspaper's failure to contact her about the Column. First, there would be no reason to do so since the Column was not about her. Second, as a matter of law, failure to investigate does not demonstrate actual malice. *See St. Amant v. Thompson*, 390 U.S. 727, 733 (1968).

fair and accurate, but not that it be "exact in every immaterial detail or that it conform to the precision demanded in technical or scientific reporting." *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 503 (Fla. 3d DCA 1993) (quoting the Restatement (Second) of Torts § 611, cmt. f). This privilege applies even if the official documents relied upon contain erroneous information. *See id.* at 502.

As stated above, the Column expressly states that it is based upon Kranert's lawsuit; a lawsuit that involves a state agency, and several high ranking state officials. For example, the second paragraph of the Column concludes by stating that Kranert is suing the DCF, while the third paragraph indicates the Column is based upon this lawsuit. It states, "Even in the stilted language of the law, his experience reads like a Gothic horror story." The tenth paragraph of the Column again expressly references "his lawsuit". Finally, Mr. Bob Williams is quoted as saying, "it's not appropriate to try litigation in the paper." A reasonable reader of the Column would clearly conclude that the Column is based upon Kranert's allegations in his lawsuit, not an independent investigation of the circumstances underlying Kranert's lawsuit.

This Column concerns a matter of public concern and is therefore a classic example of what the fair reporting privilege is meant to protect. The Column does not purport to detail and report on the underlying allegations, but rather only seeks to report on the lawsuit and its allegations.[8] Thus, as the

8. The Column correctly and accurately describes Kranert's allegations of retaliation in regard to his demotion and termination following his filing a grievance. This is the gist of the Column, as well as Kranert's lawsuit – state employees may be subject to demotion or dismissal for complaining.

Column is substantially accurate and has not exceeded the qualified privilege, the trial court properly dismissed the Complaint against the Democrat.

## III. DISMISSAL WITH PREJUDICE WAS APPROPRIATE IN THIS CASE.

Florida law holds that pretrial dispositions of libel actions are "especially appropriate" because of the chilling effect these cases have on freedom of speech and freedom of press. *Stewart v. Sun Sentinel Co.*, 695 So. 2d 360, 363 (Fla. 6th DCA 1997) (affirming dismissals and summary judgments against the plaintiff); *From v. Tallahassee Democrat*, 400 So. 2d 52, 58 (Fla. 1st DCA 1981) (affirming dismissal with prejudice); *Hauser v. Urchisin*, 231 So. 2d 6, 8 (Fla. 1970) (reversing appellate court and reinstating dismissal with prejudice). "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment cannot survive." *New York Times v. Sullivan*, 376 U.S. 254, 278 (1964). Our democratic form of government requires a free press so that debate on public issues can be "uninhibited, robust and wide-open." *Id.* at 270.

The trial court properly recognized that Smith's Complaint against the Democrat was completely devoid of merit. As such, it was properly dismissed with prejudice under Florida law. To force the Democrat to incur the substantial expense of responding to fruitless attempts at amendment by Smith could potentially deter future columns for fear of these type of suits. This is clearly contrary to the spirit of both the United States and Florida Constitutions, as recognized in numerous cases from both the United States

and Florida Supreme Courts. *See New York Times v. Sullivan*; *Hauser v. Urchisin*. Thus, dismissal with prejudice was both proper and appropriate in this case.

## IV. THE REMAINING COUNTS AGAINST THE DEMOCRAT WERE PROPERLY DISMISSED.

Smith's Count III against the Democrat alleging conspiracy to libel was also properly dismissed. There can be no conspiracy to libel when there has been no libel. *See Wright v. Yurko*, 446 So. 2d 1162, 1164-65 (Fla. 5th DCA 1984). Thus, as described above, Smith's failure to be able to state a cause of action for libel against the Democrat was fatal to her stating a valid cause of action for conspiracy to libel.

In order for a plaintiff to state a valid cause of action for intentional infliction of emotional distress, the plaintiff must allege and prove extreme and outrageous conduct. *See Clemente v. Horne*, 707 So. 2d 865, 867 (Fla. 3d DCA 1998). This alleged conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (quoting Restatement (Second) of Torts § 46 cmt. d). Under Florida law, it is the duty of the trial court "to determine in the first instance, whether the Defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Paul v. Humana Medical Plan, Inc.*, 682 So. 2d 1119, 1222 (Fla. 4th DCA 1996). This is properly tested on a motion to dismiss. *See id.*

Smith's Complaint failed to allege conduct on the part of the Democrat that even remotely approached this level.

The publishing of a Column which reports allegations of a lawsuit, but which never mentions her by name or position, cannot be considered as beyond all possible bounds of decency, atrocious, or utterly intolerable. To even suggest an intentional infliction of emotional distress claim exists again demonstrates Smith's tendency to exaggerate in order to attempt to manufacture a cause of action.

Further, the Florida Supreme Court has expressly stated, "a plaintiff cannot transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as outrageous." *Fridovich v. Fridovich*, 598 So. 2d 65, 70 (Fla. 1992). A valid cause of action for intentional infliction of emotional distress requires an independent tort based upon independent facts. *See Ford v. Rowland*, 562 So. 2d 731, 735 (Fla. 5th DCA 1990).

Smith did not allege independent facts nor an independent tort to support her claim for intentional infliction of emotional distress, nor can she. Instead, Smith impermissibly characterized the publication of allegedly libelous statements as extreme and thus sought to support her claim. Smith's claim against the Democrat was grounded in libel. There are no allegations or facts to support any other cause of action. Thus, the trial court properly dismissed Count 5 of Smith's Complaint.

## CONCLUSION

Please read the Column. It libels no one; and certainly not someone that was not even identified or described. For freedom of the press to have the meaning intended by the framers of the Constitution, meritless lawsuits that can, and in fact do, have a chilling effect, must be promptly rejected by the courts. The trial and appellate courts below properly did so. This case has already consumed far too many resources and far too much time. There are much worthier cases and issues for this Court to consider. For the reasons set forth herein, Tallahassee Democrat and Bill Cotterell respectfully request that this Court deny Smith's Petition for Writ of Certiorari.

Respectfully submitted,

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